

Overview

FreedomCare has asked our firm to provide our view on two health care plans that it has created for employers to provide to their employees in order to comply with the Affordable Care Act (the “ACA”) and properly avoid the applicable penalties set forth thereunder. The following is a brief discussion of the two plans, an overview of the ACA penalties, and a discussion of which penalties each plan properly avoids for the employer and its employees.

The FreedomCare Plans

FreedomCare offers two self-insured plans that work in tandem to satisfy both the employer mandate and the individual mandate.

The first plan that FreedomCare offers is the “FreedomCare Basic Plan” (the “Basic Plan”). The Basic Plan only covers the preventive health services that are required by the ACA. No other services or benefits are covered under the Basic Plan.

The second plan that FreedomCare offers is the “FreedomCare Plus Plan” (the “Plus Plan”). The Plus Plan offers a more robust benefits package compared to the Basic Plan with the goal of offering a health plan that meets the minimum value requirement of the ACA. In order to meet the minimum value requirement, the Plus Plan’s share of the total cost of benefits provided under the plan must be at least 60 percent. FreedomCare has assured us that its actuary has confirmed that the Plus Plan meets the minimum value requirement.

The Penalties

An employer should be aware of how the ACA’s employer mandate will impact its business and how the individual mandate will affect its workforce. There are two penalties associated with the employer mandate.

The first penalty (the “A Penalty”) is triggered if an applicable large employer fails to offer minimum essential coverage to 95 percent (70 percent in 2015) of its full-time employees and at least one full-time employee receives a premium tax credit from a state or federal Exchange. Minimum essential coverage is broadly defined by the ACA and includes an employer sponsored group health plan.

A premium tax credit is only available to an individual or family with a household income of at least 100 percent, but not more than 400 percent of the federal poverty line. Additionally, an individual is only eligible for a premium tax credit if he or she is not eligible for minimum essential coverage under an eligible employer-sponsored health plan that is both affordable (discussed below) and meets the minimum value requirement or through a government plan (including, but not limited to Medicare, Medicaid, or TRICARE).

The A Penalty is calculated by determining the number of full-time employees and reducing that number by 30 (80 in 2015). This number is multiplied by \$2,000¹.

$$\text{A Penalty} = \$2,000 * (\# \text{ of full-time employees} - 30^2)$$

The second penalty (the “B Penalty”) is triggered if an applicable large employer offers 95 percent (70 percent in 2015) of its full-time employees the opportunity to enroll in a health plan that provides minimum essential coverage and one or more full-time employees receives a premium tax credit from a state or federal Exchange. The B Penalty is calculated by determining the number of full-time employees who received a premium tax credit from a state or federal Exchange and multiplying that number by \$3,000.³

$$\text{B Penalty} = \$3,000 * (\# \text{ of full-time employees receiving a premium tax credit}^4).$$

There are three ways an employee who is offered minimum essential coverage (and thus satisfying the A Penalty) may, however, trigger the B Penalty.

- (1) The first way that the B Penalty can be triggered is if the coverage offered is not affordable. Coverage is affordable for ACA purposes if the cost for self-only coverage is less than or equal to 9.5 percent of an employee’s household income. In many situations employers will not be able to determine an employee’s household income. As a result, the final regulations provide three safe harbors for employers to satisfy the affordability requirement:
 - a. The first affordability safe harbor is the form W-2 safe harbor which allows an employer to satisfy the affordability requirement of the ACA so long as the employer’s lowest cost self-only coverage that provides minimum value does not exceed 9.5 percent of the employee’s current year W-2 wages (Box 1 of the W-2). At the end of the year the employer determines this safe harbor on an employee-by-employee basis.
 - b. The second affordability safe harbor is the rate of pay safe harbor. The rate of pay safe harbor can be broken into two tests, one test for hourly employees and another test for salaried employees. For hourly employees, if the employee’s required contribution for the month for the employer’s lowest cost self-only coverage that provides minimum value does not exceed 9.5 percent of the product of the employee’s hourly rate of pay and 130 hours, the coverage will be deemed affordable for ACA purposes. For salaried employees, if the employee’s required contribution for the month for the employer’s lowest cost self-only coverage that provides minimum value does not exceed 9.5

¹ Technically the A Penalty is calculated on a monthly basis. However, for simplicity it is discussed based on a yearly calculation.

² Transition relief allows an employer to reduce the A Penalty by 80 in 2015. Additionally, full-time employees who are in a limited non-assessment period are not included in the A Penalty calculation.

³ Technically, the B Penalty is calculated on a monthly basis. However, for simplicity it is discussed based on a yearly calculation.

⁴ The B Penalty can never be triggered if the A Penalty applies. Additionally, full-time employees who are in a limited non-assessment period are included in the B Penalty calculation.

percent of the employee's monthly salary, the coverage will be deemed affordable for ACA purposes.

- c. The final affordability safe harbor allows an employer to satisfy the affordability requirement of the ACA so long as the employee's monthly required contribution for the employer's lowest cost self-only coverage that provides minimum value does not exceed 9.5 percent of the monthly federal poverty line for a single individual. In 2014 the federal poverty line for an individual in the continental United States was \$11,670⁵. Therefore, if an employer charges its employees \$92.38 or less the employer will satisfy the federal poverty line safe harbor.
- (2) The second way that the B Penalty can be triggered is if the coverage offered does not provide minimum value. To provide minimum value the health plan's share of the total cost of benefits provided under the plan must be at least 60 percent. It may be easier to think of minimum value as the plan offering at least a bronze level of coverage.
 - (3) The third way that the B Penalty can be triggered is if the employer does not offer a full-time employee minimum essential coverage, but the employer offers coverage to 95 percent (70 percent in 2015) of its full-time employees. The 5 percent (30 percent in 2015) of full-time employees who are not offered coverage, can still trigger the B Penalty if one or more receives a premium tax credit from an Exchange.

Additionally, an employer should be aware of the potential penalties its employees must pay if the employee is not covered under minimum essential coverage. If an individual is not covered under minimum essential coverage, the individual will be responsible for a penalty unless one of the exemptions from the individual mandate applies. In 2015 an individual who is not covered by minimum essential coverage will be assessed a penalty of \$325 or, if greater, 2 percent of the individual's household income⁶. The individual mandate penalty increases in 2016 to \$695 per year or, if greater, 2.5 percent of the individual's household income⁷.

The FreedomCare Plans and the ACA Penalties

In our view, the Basic Plan satisfies the ACA's definition of minimum essential coverage. Therefore, an employer that offers the Basic Plan to 95 percent (70 percent in 2015) of its full-time employees in a particular calendar month will not be responsible for the A Penalty. However, the Basic Plan does not provide minimum value so it does not provide relief to the employer from the B Penalty. Any employee who accepts an employer's offer of coverage under the Basic Plan will be covered by minimum essential coverage. Therefore, an employee who accepts the Basic Plan will not be responsible for the individual mandate penalty.

⁵ Employers using the federal poverty line safe harbor may use the guidelines in effect six months prior to the beginning of the plan year.

⁶ Technically an individual's household income is adjusted slightly using Internal Revenue Code §6012(a)(1).

⁷ Technically an individual's household income is adjusted slightly using Internal Revenue Code §6012(a)(1).

In our view, the Plus Plan satisfies the ACA's definition of minimum essential coverage and has been verified as providing minimum value by an actuary. Therefore, an employer that offers the Plus Plan to 95 percent (70 percent in 2015) of its full-time employees in a particular calendar month will not be responsible for the A Penalty or B Penalty for each full-time employee for whom coverage is offered at an affordable rate. Each employer will have to calculate that affordable rate for its workforce based on the pay scales of each job category established by the employer. Just like the Basic Plan, any employee who accepts the Plus Plan will be covered by minimum essential coverage. Therefore, an employee who accepts the Plus Plan will not be responsible for the individual mandate penalty. However, what is deemed "affordable" by the ACA may not actually be affordable to lower paid employees.

For that reason, FreedomCare has created a solution of offering the Basic Plan along side the Plus Plan so that employers and employees can satisfy all of the ACA obligations related to the employer mandate and the individual mandate. By offering both Plans in unison the employer will properly avoid both the A and B Penalties, while the employee will avoid the individual mandate penalty and, at a minimum, have access to preventive health services under the Basic Plan. Should an employee have a need for more comprehensive health coverage, he or she would be free to select the Plus Plan or shop around on the appropriate Exchange for more comprehensive coverage⁸.

⁸ By offering the Plus Plan the employer will cause an employee and his/her dependents to be ineligible for premium tax credits. Unfortunately, there is no way to avoid the B Penalty without also making an employee and his/her dependents ineligible for premium tax credits.