

September 27, 2019

COVERED CALIFORNIA ISSUES MORE NOTICES OF EMPLOYEE PREMIUM TAX CREDITS

They are at it again! Covered California has begun issuing another round of notices to any Applicable Large Employers (ALEs) who had a full-time employee apply for a premium tax credit (PTC) in 2019.

The notification states that the employee has been conditionally approved for a PTC. Importantly, these notices form the basis for triggering the ACA employer mandate pay or play penalties.

Why Should an Employer Care?

It is worth repeating – these notices are used as the basis of triggering the ACA employer mandate pay or play penalties. An employer that does not appeal the Covered California's conditionally approved PTC will have the Covered California notice of the employee's PTC submitted to the IRS for issuance of the IRC penalty letter (IRS 226-J letter) for violating the ACA pay or play rules.

How Does the Employer Appeal?

The initial appeal is filed through healthcare.gov at www.healthcare.gov/downloads/marketplace-employer-appeal-form.pdf and must be filed within **90 days** of the date of the notice. **CAUTION: Don't delay the appeal as it will take time to gather and review the employee records that will be sent as supporting evidence and to ensure a successful appeal.**

It is important to note that the appeal process can be complex and the appeal may likely result in a denial without understanding the appropriate response and the supporting evidence to persuade the appeal reviewer that the employer offered an affordable offer of coverage that meets minimum value.

To begin with, the appeal is reviewed by a division of the Department of Health and Human Services called the Health Insurance Marketplace (HIM). The HIM assigns the employer's appeal to a reviewer who will first review the employer's appeal to determine if the appropriate evidence was submitted. This often results in a request for additional information to be submitted within 30 days of the date of the notice. The information requested is substantial and if not submitted in the format requested will result in a denial of the appeal. At this point, the HIM decision is submitted to the IRS and used to issue a penalty letter to the employer.

It is advisable to reach out for assistance from a legal expert in the handling of the appeals. The HIM appeal process will often list an onerous amount of information, all of which may not be necessary to properly assert the employer's specific offer of qualified health coverage. After working closely with the HIM and IRS on many PTC appeals, ERISA Compliance Center has received affirmation from the IRS that an employer who exhausts the administrative appeal process with the HIM will be able to have the appeal reviewed 'de novo' (meaning 'anew' or 'from

the beginning') and will not weigh the HIM decision against the employer. However, the IRS has stated that they would not favorably view an employer who ignored the Covered California notices and took no action.

For additional information or assistance on the Covered California notice of employee's PTC, please feel free to contact Mary Jane Eadson at mary@erisa-comp.com or (760) 468-4082.

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Additional Information can be found at:

1. Sample Notice of Covered California:
https://hbex.coveredca.com/toolkit/pdfs/2016_Employer_Notice_Final.pdf
2. Appeal Process of Covered California: The appeal process is handled through healthcare.gov (even for Covered California: enrollments): <https://www.healthcare.gov/downloads/marketplace-employer-appeal-form.pdf>.

THE MEMORANDUM PROVIDED ABOVE IS A COMPLIANCE REPORT AND IS NOT A LEGAL OPINION OR TO BE CONSTRUED AS LEGAL ADVICE.