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Insider

IRS finalizes ACA ‘family glitch’ fix

By Maureen Gammon, Anu Gogna and Ben Lupin

On October 11, 2022, the IRS issued **final regulations** to fix the so-called “family glitch” loophole in the Affordable Care Act (ACA). The family glitch results from an ACA provision that makes families who are deemed to be eligible for “affordable” employer-provided health coverage ineligible for premium tax credits (PTCs) if they enroll in ACA exchange coverage; however, the law based the affordability determination on the premium cost for self-only coverage and therefore didn’t reflect the additional costs of covering family members. In addition, the IRS issued **Notice 2022-41**, which clarifies that employees, spouses and dependents can transition from employer-sponsored health coverage to subsidized exchange coverage midyear if the employer plan sponsor amends its non-calendar-year cafeteria plan to allow for such changes.

Background

An individual is only eligible for subsidies on the ACA exchange if he or she does not have access to affordable employer-sponsored health insurance. Since 2014, the affordability of health coverage has been based on the cost of the employee’s *individual* coverage, not factoring in the higher cost of covering additional family members. So, when an individual has access to affordable employee-only coverage, both the employee and the employee’s family members become ineligible for subsidized exchange coverage.

Final ‘family glitch’ regulations

To fix this “family glitch” loophole, beginning in 2023, affordability of employer-sponsored coverage for an employee’s *family members* will be based on the employee’s cost to cover the employee *and those family members,* rather than the cost to cover just the employee. Specifically, employer-provided coverage will be considered affordable for an employee’s family members if the cost of *family coverage* does not exceed 9.5% (as adjusted) of household income.

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For the affordability calculations, “family members” are those in the employee’s tax family (i.e., the employee, a spouse filing joint taxes or a dependent). Other family members (such as adult children up to age 26) might be offered job-based coverage through the employee’s employer. But, if they are no longer a dependent on the employee’s tax return, they are not included in the affordability calculations.

The new affordability requirements only apply to a family member’s ability to receive a subsidy on the ACA exchange. If a family member of an employee does receive a subsidy, the employee’s employer faces no penalty. This is because the final regulations do not change the ACA employer mandate, which provides that applicable large employers (those with 50 or more full-time and full-time equivalent employees) must offer minimum essential health coverage that is affordable and meets minimum value to employees and their dependents, or pay a penalty if an employee receives a PTC for ACA exchange coverage. With respect to family members, an employer-sponsored plan is considered to provide minimum value only if the plan’s share of the total allowed costs of benefits provided to family members is at least 60%, and the plan benefits include substantial coverage of inpatient hospital services and physician services. For purposes of determining whether applicable large employers offer affordable minimum essential coverage to their employees, employers may continue using the available safe harbors (Form W-2, rate of pay and federal poverty level).

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Employer implications

Although the regulations do not directly affect employer plan sponsors, there are some potential indirect impacts. For example, an employee's family members may opt to forego the employer-provided coverage for subsidized ACA exchange coverage; however, if an employee's family members decide to purchase health coverage on the ACA exchange while the employee stays with the employer-provided plan, the family would have multiple deductibles and maximum out-of-pocket limits for this type of "split coverage," potentially increasing total out-of-pocket costs. In addition, families might prefer the benefits and provider networks of employer coverage compared with ACA exchange coverage. As the 2023 coverage year approaches, employers might want to communicate to their employees about their available options.

Non-calendar-year cafeteria plan option

The IRS guidance in Notice 2022-41 allows participants in non-calendar-year cafeteria plans to change their family coverage in an employer-sponsored group health plan to allow one or more family members to enroll in a subsidized plan on the ACA exchange (i.e., a qualified health plan [QHP]). Employers can choose to amend non-calendar-year cafeteria plans to allow for these midyear election changes if both the following conditions are met:

1. One or more related individuals are eligible for a special enrollment period to enroll in a QHP, or one or more already-covered related individuals seek to enroll in a QHP during the exchange's annual open enrollment period.
2. The election change corresponds with the intended QHP enrollment for new coverage effective beginning no later than the day immediately following the last day of the revoked coverage.

As the 2023 coverage year approaches, employers might want to communicate to their employees about their available options.

The guidance applies to elections effective on or after January 1, 2023. Amendments must be adopted on or before the last day of the plan year in which the changes are allowed and may be effective retroactively to the first day of that plan year if the plan operates according with the guidance and participants are informed of the amendment. An employer may amend a cafeteria plan to adopt the election changes for a plan year that begins in 2023 at any time on or before the last day of the plan year that begins in 2024.

Going forward

- Applicable large employers that are subject to the ACA's employer mandate should note that these final regulations *do not* impact the affordability or minimum value analysis under those rules; therefore, as long as an applicable large employer offers affordable, minimum value coverage to its full-time employees and their dependents (based on *self-only* coverage affordability), the employer would not be subject to employer mandate penalties.
- Employer plan sponsors with *non-calendar-year plans* will need to decide if they want to amend their cafeteria plans to allow family members of employees who may be eligible for ACA exchange coverage with subsidies to drop their current family coverage in order to enroll in exchange coverage. Amendments must be done within the time frames set out in the notice.

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IRS extends amendment deadline to additional CARES Act changes

By Stephen Douglas and Bill Kalten

In **Notice 2022-45,** the IRS extended the deadline – to December 31, 2025 – to adopt amendments for changes to the Coronavirus Aid, Relief, and Economic Security (CARES) Act loan and distribution options and the retirement-related disaster relief included in the Taxpayer Certainty and Disaster Tax Relief Act of 2020 (Relief Act) (with special amendment deadline extensions for governmental plans). Notice 2022-45 also extends the Internal Revenue Code section 411(d)(6) cutback relief for amendments that reflect these CARES Act provisions and are adopted by the extended deadline. This guidance supplements the plan amendment relief previously granted through **Notice 2022-33**.

Although plans will now have until December 31, 2025, to adopt these amendments, it is important that they continue to operate within these requirements.

Background

In August, the IRS issued Notice 2022-33, which extended the deadline to adopt amendments for changes under (1) the Setting Every Community Up for Retirement Enhancement (SECURE) Act; (2) the Bipartisan American Miners Act of 2019 (lowering the in-service distribution age to 59 ½ for pension plans); and (3) the CARES Act (waiving 2020 required minimum distributions), until December 31, 2025.

The notice also extended the Internal Revenue code section 411(d)(6) cutback relief for amendments that reflect the SECURE Act changes provided they are adopted before the extended deadline. Special amendment deadline extensions were also provided for governmental plans.

Notably, however, the extensions did not apply to the special coronavirus loan and distribution options provided under section 2202 of the CARES Act nor to the retirement-related disaster relief included in the Relief Act, which meant that many plans would still have to be amended for these provisions by the end of the 2022 plan year.[1]

Now, with the deadline extension expanded to include these additional changes, amendments to reflect the CARES Act and Relief Act – as well as the SECURE Act and Miners Act – may be adopted on a single date. These extensions will give the IRS more time to issue guidance that plan sponsors will need to prepare amendments by the extended 2025 deadline.

Going forward

Notice 2022-45 applies to amendments that would have otherwise been required as early as this year. Although plans will now have until December 31, 2025, to adopt these amendments, it is important that they continue to operate within these requirements.

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[1] For more information on the earlier IRS Notice 2022-33, see "**IRS extends deadline to adopt amendment under SECURE Act, provisions under Miners Act and CARES Act**," *Insider*, August 2022.

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