



Health Care Reform

LEGISLATIVE BRIEF

Brought to you by Seubert & Associates

Form W-2 Reporting Requirements

The Affordable Care Act (ACA) requires employers to report the aggregate cost of employer-sponsored group health plan coverage on their employees' Forms W-2. The purpose of the reporting requirement is to provide information to employees regarding how much their health coverage costs. The reporting does not mean that the cost of the coverage is taxable to employees.

This reporting requirement was originally effective for the 2011 tax year (for the Forms W-2 due by the end of January 2012). However, the IRS later made reporting optional for 2011 for all employers. In addition, the IRS made the reporting requirement **optional for small employers** (those that file fewer than 250 Forms W-2) until further guidance is issued. Beginning in 2012, the IRS made the reporting requirement **mandatory for large employers**. Thus, the W-2 reporting requirement is currently mandatory for large employers, but optional for small employers.

In April 2011, the IRS provided interim guidance on how employers should comply with the Form W-2 reporting requirement. The IRS then revised and clarified its interim guidance by releasing [Notice 2012-9](#) on Jan. 3, 2012. Notice 2012-9 provides technical reporting information for employers that include health coverage cost information on Forms W-2 for 2012 and later years.

FORM W-2 REPORTING REQUIREMENT

Section 9002(a) of the ACA provides that employers must disclose the aggregate cost of applicable employer-sponsored coverage provided to employees on the Form W-2. Section 9002(a) specifically adds this information to the list of other items that must be included on the Form W-2. These items include information such as the individual's name, social security number, wages, tax deducted, the total amount incurred for dependent care assistance under a dependent care assistance program and the amount contributed to any health savings account (HSA) by the employee or his or her spouse.

The inclusion of this information on the Form W-2 does not change the requirements with respect to taxable income or the tax exclusion for amounts paid for medical care or coverage. Those items are addressed in another portion of the tax law that is not affected by this change. However, this information may be used to determine whether a plan is a "Cadillac plan" for purposes of the excise tax on high-cost health plans that will take effect in 2018.

The IRS has clarified that the reporting rule does not require an employer to issue a Form W-2 including the aggregate cost of coverage to an individual if the employer does not otherwise have to issue a Form W-2 for that person. For example, an employer would not have to issue a Form W-2 to a retiree or other former employee receiving no reportable compensation.

EMPLOYERS SUBJECT TO THE REPORTING REQUIREMENT

In general, all employers that provide "applicable employer-sponsored coverage" must comply with the Form W-2 reporting requirement. This includes government entities, churches and religious organizations, but does not include Indian tribal governments or tribally chartered corporations wholly owned by an Indian tribal government.

The Form W-2 reporting requirement is currently optional for small employers. Small employers will continue to be exempt from the reporting requirement, unless and until the IRS issues further guidance.

Form W-2 Reporting Requirements

An employer is considered a small employer if it had to file **fewer than 250 Forms W-2** for the prior calendar year. Thus, if an employer is required to file fewer than 250 Forms W-2 for 2013, the employer would not be subject to the reporting requirement for 2014.

The IRS has indicated that the Internal Revenue Code's aggregation rules do not apply for purposes of determining whether an employer filed fewer than 250 Forms W-2 for the prior year. However, if an employer files fewer than 250 Forms W-2 only because it uses an agent to file them, the employer does not qualify for the small employer exemption.

Large employers (those that file 250 or more Forms W-2) were required to comply with the reporting requirement starting in 2012.

COVERAGE THAT MUST BE REPORTED

Under the Form W-2 reporting requirement, the information that must be reported relates to "applicable employer-sponsored coverage." **Applicable employer-sponsored coverage** is, with respect to any employee, coverage under any group health plan made available to the employee by the employer which is excludable from the employee's gross income under Code section 106.

For purposes of this reporting requirement, it does not matter whether the employer or the employee pays for the coverage – it is the **aggregate cost of the coverage** that must be reported. The aggregate cost of the coverage is determined using rules similar to those used for determining the applicable premiums for purposes of COBRA continuation coverage. It must be determined on a calendar year basis.

This reporting obligation does *not* require the following types of coverage to be reported on the Form W-2:

- Coverage under a dental or vision plan that is not integrated into a group health plan providing other types of health coverage;
- Coverage under a health reimbursement arrangement (HRA);
- Coverage under a multiemployer plan;
- Coverage for long-term care;
- Coverage under a self-insured group health plan that is not subject to COBRA (such as a church plan);
- Coverage provided by the government primarily for members of the military and their families;
- Excepted benefits, such as accident or disability income insurance, liability insurance or workers' compensation insurance;
- Coverage for a specific disease or illness, hospital indemnity or other fixed indemnity insurance, provided the coverage is offered as independent, noncoordinated benefits and payment for the benefits is taxable to the employee; and
- Coverage under an employee assistance program (EAP), wellness program or on-site medical clinic if the employer does not charge COBRA beneficiaries a premium for the benefits.

The ACA reporting obligation also does not apply to amounts contributed to an Archer medical savings account (Archer MSA) or amounts contributed to an HSA. Those amounts are already required to be separately accounted for on the Form W-2. Thus, even small employers must report all employer contributions (including an employee's contributions through a cafeteria plan) to an HSA on Form W-2.

This Legislative Brief is not intended to be exhaustive nor should any discussion or opinions be construed as legal advice. Readers should contact legal counsel for legal advice.

Form W-2 Reporting Requirements

Similarly, salary reduction contributions to a health flexible spending arrangement (health FSA) under a cafeteria plan are not required to be reported. However, if the amount of the health FSA for the plan year (including optional employer flex credits) exceeds the salary reduction elected by the employee for the plan year, the amount of the health FSA minus the salary reduction election for the health FSA must be reported.

Example: ABC Company maintains a cafeteria plan that offers permitted taxable benefits (including cash) and qualified nontaxable benefits (including a health FSA). The plan offers a flex credit in the form of a match of each employee's salary reduction contribution. Sandy makes a \$700 salary reduction election for a health FSA. ABC Company provides an additional \$700 to the health FSA to match Sandy's salary reduction election. The amount of the health FSA for Sandy for the plan year is \$1,400. The amount of Sandy's health FSA (\$1,400) for the plan year exceeds the salary reduction election (\$700) for the plan year. ABC Company must include \$700 (\$1,400 health FSA amount minus \$700 salary reduction) in determining the aggregate reportable cost.

In addition, employers may include in the Form W-2 reportable amount the cost of coverage that is not required to be included in the aggregate reportable cost, such as HRA coverage, provided the coverage is applicable employer-sponsored coverage and is calculated under a permissible method.

METHODS OF REPORTING

Coverage Provided after Termination of Employment

If an employer provides coverage (such as continuation coverage) to an employee who terminates employment during the year, the employer may apply any reasonable method of reporting the cost of coverage for that year, as long as that method is used consistently for all employees. Regardless of the method used, an employer does not have to report any amount for an employee who requests a Form W-2 before the end of the calendar year in which the employee terminated employment.

Example: Bob is an employee of XYZ Company on January 1, and continues employment through April 25. Bob had individual coverage under XYZ Company's group health plan through April 30, with a cost of coverage of \$350 per month. Bob elected continuation coverage for the six months following termination of employment, covering the period May 1 through Oct. 31, for which he paid \$350 per month. XYZ Company will have applied a reasonable method of reporting Bob's cost of coverage if it uses either of the following methods consistently for all employees who terminate coverage during the year:

- Reports \$1,400 as the reportable cost under the plan for the year, covering the four months during which Bob performed services and had coverage as an active employee; or
- Reports \$3,500 as the reportable cost under the plan for the year, covering both the monthly periods during which Bob performed services and had coverage as an active employee, and the monthly periods during which Bob had continuation coverage under the plan.

Programs with Non-reportable Benefits

Also, if a program offers benefits that must be reported as well as other benefits that are not subject to reporting, an employer may use any reasonable allocation method to determine the cost of the portion of the program providing a reportable benefit. If the portion of the program that provides a reportable benefit is only incidental in comparison to the portion of the program providing other benefits, the employer is not required to include either portion of the cost on the Form W-2.

This Legislative Brief is not intended to be exhaustive nor should any discussion or opinions be construed as legal advice. Readers should contact legal counsel for legal advice.

Form W-2 Reporting Requirements

Coverage Periods Spanning Calendar Years

If a coverage period, such as the final payroll period of a calendar year, includes December 31 and continues into the next calendar year, the employer has the following options:

- Treat the coverage as provided during the calendar year that includes December 31;
- Treat the coverage as provided during the following calendar year; or
- Allocate the cost of coverage between each of the two calendar years using a reasonable allocation method that is consistently applied to all employees. The allocation method should generally relate to the number of days in the period of coverage that fall within each of the two calendar years.

PENALTIES

Violations of the ACA's W-2 reporting requirements are subject to existing rules on filing Forms W-2. A penalty will apply if the employer:

- Fails to file Form W-2 by the required due date;
- Fails to include all information required to be shown on Form W-2;
- Includes incorrect information on Form W-2;
- Files on paper forms when the employer is required to e-file;
- Reports an incorrect taxpayer identification number (TIN);
- Fails to report a TIN; or
- Fails to file paper Forms W-2 that are machine readable.

The amount of the penalty is based on when the employer file the correct Form W-2. The penalty is:

- **\$30 per Form W-2** if the employer correctly files within 30 days (by March 30 if the due date is Feb. 28), up to a maximum of \$250,000 per year;
- **\$60 per Form W-2** if the employer correctly files more than 30 days after the due date but by Aug. 1, up to a maximum of \$500,000 per year; or
- **\$100 per Form W-2** if the employer files after Aug. 1, does not file required Forms W-2 or does not file corrections and does not meet any exceptions to the penalty, up to a maximum of \$1,500,000 per year.

An employer may also be subject to an additional penalty for:

- Failing to provide the Form W-2 by Jan. 31;
- Failing to include all information required to be shown on the Form w-2; or
- Including incorrect information on the Form W-2.

This penalty is an additional penalty and is applied in the same manner, and with the same amounts, as the penalty for failure to file correct information returns by the due date.

If any violation is due to **intentional disregard** of the filing or correct information requirements, the penalty is at least **\$250 per Form W-2** with no maximum penalty. If an employer **willfully files a fraudulent Form W-2** for

Form W-2 Reporting Requirements

payments that the employer claims it made to another person, that person may be able to sue the employer for damages. The employer may have to pay \$5,000 or more.

Exceptions

An **inconsequential error or omission** is not considered a violation. An inconsequential error or omission does not prevent or hinder the IRS from processing the Form W-2, from correlating the information required to be shown on the form with the information shown on the payee's tax return or from otherwise putting the form to its intended use. Errors and omissions that are *never* inconsequential are those relating to a TIN, a payee's surname, a significant item in a payee's address, any money or dollar amounts and whether the appropriate form was used.

A penalty will not *apply* if the employer can show that the **failure was due to reasonable cause and not to willful neglect**. In general, the employer must be able to show that:

- The failure was due to an event beyond the employer's control or due to significant mitigating factors; and
- The employer acted in a responsible manner and took steps to avoid the failure.

Even if an employer cannot show reasonable cause, under the **de minimis rule for corrections**, the penalty will not apply to a certain number of returns if the employer:

- Filed those Forms W-2 on or before the required filing date;
- Either failed to include all of the information required on the form or included incorrect information; and
- Filed corrections of these forms by Aug. 1.

If an employer meets all of the de minimis rule conditions, the penalty for filing incorrect Forms W-2 will not apply to the greater of 10 Forms W-2 or one-half of 1 percent of the total number of Forms W-2 that the employer is required to file for the calendar year.

COMPLIANCE STEPS FOR EMPLOYERS

Employers that file 250 or more Forms W-2 should ensure that they are in compliance with the ACA's W-2 reporting requirement. They should make sure that they can identify the applicable employer-sponsored coverage that is provided to each employee and calculate the aggregate cost of that coverage.

Employers may also have to address questions from employees regarding whether their health benefits are taxable under this reporting requirement. They can assure employees that this reporting is for informational purposes only, to show employees the value of their health care benefits so they can be more informed consumers. The amount reported does not affect tax liability, as the value of the employer contribution to health coverage continues to be excludible from an employee's income, and is not taxable.