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# NOTICE 2016-17: STUDENT HEALTH PLANS & THE ACA

## Background

Previously, the Departments of the Treasury, Labor, and Health and Human Services (DHHS) (collectively, “Departments”) released multiple regulations on Employer Payment Plans (EPPs), including employer reimbursement of individual premium expenses incurred for individual market health insurance policies. The regulations indicated that these employer sponsored reimbursement plans violated the Affordable Health Care (ACA) prohibition on annual dollar limits, in addition to the prohibition on cost-sharing of preventative services. Because of this, employer sponsored plans would be subject to fines if they reimbursed/directly paid for individual market health insurance policies on behalf of employees.

Certain student health plans may be classified as EPPs. A 2012 DHHS final rule defined student health insurance coverage as a type of individual market health insurance coverage offered to students and their dependents under a written agreement between an institution of higher education and an issuer. Many colleges provide students with reduced or zero cost health insurance under their student packages, which may be self-insured by the college, or provided through individual health insurance. Typically, these students receive bills from the schools which may include premium reduction arrangements. Some students also perform services for their schools, such as teaching or conducting research, which raises the concern that these premium reduction arrangements constitute employer-sponsored group health plans, or EPPs that violate the ACA.

## Technical Release 2016-2017

Notice 2016-17 (hereinafter referred to as the “2016 Release”) explains that under certain circumstances, temporary transitional relief will be provided to student health insurance plans (SHIPs) that violate the market reform provisions of the ACA and Public Health Service Act (PHS Act). Simply put, the 2016 Release explains that although some schools’ premium reduction arrangements, designed to provide student health insurance, may constitute EPPs in violation of market reform provisions, the Departments will not assert that the premium reduction arrangements fail to satisfy the PHS Act, if an arrangement is offered in connection with other student health coverage for a plan or policy year beginning before January 1, 2017.

## Notice 2016 – 2017: Student Health Plans & the ACA (Continued)

### Action Required

For plan or policy years before January 1, 2017, colleges which have been offering premium reduction arrangements in connection with other student health coverage need not take immediate action, but should begin modifying their policies in advance of that date. However, in the future, colleges will no longer be able to reimburse or directly pay for individual market health insurance policies on behalf of student employees for any plan or policy years starting January 1, 2017 or later.

**For the complete details, see:**

**Notice 2016-17:** <https://www.irs.gov/pub/irs-drop/n-16-17.pdf>

## NOTICE 2016-14: EXPATRIATE COVERAGE & HEALTH INSURANCE PROVIDER'S FEE

All health insurers are subject to the health insurance provider's fee under Section 9010 of the Affordable Care Act (ACA).

Previously, for health insurer provider's fee years 2014 and 2015, the definition of expatriate health plan was borrowed from the definition of expatriate health plans under the Medical Loss Ratio (MLR) final rules. Notice 2016-14 adopts that same definition from the MLR final rules, and does not adopt the definition of expatriate health plans as defined under the Expatriate Health Coverage Clarification Act of 2014 (EHCCA).

Notice 2016-14 also provides instructions to insurance carriers who may want to exclude premiums received for expatriate coverage.

### No Action Required

Employers may receive some savings because of this rule, which may reduce the overall net premiums received from insurance carriers as expatriate health plans are excluded from the health insurance provider's fee.

**For the complete details, see:**

**Notice 2016-6:** <https://www.irs.gov/pub/irs-drop/n-16-14.pdf>

## HHS ISSUES NEW GUIDANCE ON INDIVIDUALS & ACCESS TO PHI

On January 7, 2015, Health and Human Services (HHS) issued new guidance regarding an individual's right to access his or her health information under the HIPAA Privacy Rule. This new guidance further establishes the rights of an individual to access protected health information (PHI) maintained about the individual or by a covered entity in a designated record set. The following is a summary of some of the provisions of this new guidance:

- **PHI Definition** – The guidance notes that individual rights extend only to PHI in a designated record set, and examples are provided to illustrate what is, and is not, part of the designated record set. Some examples of where covered entities may deny access requests are also included in this guidance.
- **Requests for Access** – Covered entities are allowed to request access to their PHI in writing (in a form that does not create a barrier or unreasonably delay access to PHI), and may offer electronic means for submission of these requests, but a covered entity is not allowed to require an individual to come to a physical office, use a web portal, or mail a request in order to make that request. Methods of verifying the identity of individuals making the request to access PHI are also provided in the guidance.
- **Providing Access** – The manner of providing PHI by the covered entity to the individual may be governed by the individual, such as naming a specified location for pick up, or having a copy of the PHI mailed or delivered electronically. If such access includes unencrypted means, covered entities must warn of the associated risks of such delivery, and confirm if such delivery is still acceptable by the individual. These requests are limited to any reasonable manner, and do not require the covered entity to potentially compromise the integrity of its security in order to accommodate such requests. Paper copies are permitted, if an individual rejects any of the electronic formats that the covered entity has provided as options.
- **Third Parties** – Third parties may receive PHI, so long as the covered entity receives written authorization by the individual, which includes the name of the designee, and where to send the PHI.
- **Business Associates** – Rights provided under this new guidance also allow individuals to make such requests from Business Associates of the covered entity, and covered entities also have the duty to provide PHI held by Business Associates.
- **Timelines** – Covered entities generally must provide access to PHI within 30 calendar days after the request is made.
- **Fees** – The guidance states that the types of costs associated with PHI requests can be charged to the individual making such requests. However, costs that covered entities incur due to verification, documentation, searching for and retrieving PHI, systems maintenance, storage, or infrastructure, cannot be recovered.

### Action Required

Employers who may possess employee's PHI through a health plan may want to consider the methods in which they will be delivering and meeting any employee requests for PHI. Employers with health plans should update their policies and procedures to include proper protocol for such PHI requests by employees.

**For the complete details, see:**

**HHS Website:** <http://www.hhs.gov/hipaa/for-professionals/privacy/guidance/access/>

## QUESTION OF THE MONTH

**Q:** Our company has a regular full-time workforce of approximately 40 employees. Each year, we hire about 80 more full-time retail employees in November and December for the holiday shopping season. How do we determine whether we are a large enough employer for application of the employer shared responsibility rules?

**A:** For purposes of determining if your company is subject to employer shared responsibility, you must measure your workforce by counting all your employees – but, as explained below, there are special rules for seasonal workers. As background, starting in 2015, under the employer shared responsibility provisions of Code § 4980H, an “applicable large employer” (ALE) may be subject to penalties for failure to offer adequate health coverage to enough of its full-time employees (and dependents).

An ALE is generally an employer that employed 50 or more full-time employees (including full-time equivalents) during the prior year. Although seasonal workers must be included when determining whether your workforce exceeds 50 full-time employees (including full-time equivalents), you will not be considered an ALE if you passed that threshold for 120 days or fewer during a calendar year and the employees in excess of 50 who were employed during that period were seasonal workers. A “seasonal worker” is one who performs labor and services on a seasonal basis, including retail workers employed exclusively during holiday seasons. (Employers are permitted to apply a reasonable, good faith interpretation of the term “seasonal worker.”)

It appears you can apply the seasonal worker exception because your workforce exceeds 50 full-time employees for no more than 120 days, and the number of full-time employees would be less than 50 during those months if seasonal workers were disregarded. Note that you must determine your ALE status for each year by counting the number of employees during the prior year and measuring the number of days that seasonal workers were actually employed during the preceding year. Once the prior year ends, your status as an ALE (or not) is fixed for the current year.

Also be aware that there is a distinction between the terms “seasonal worker,” relevant for determining ALE status, and “seasonal employee,” relevant – for employers that are ALEs – for determining an employee’s status as a full-time employee under the look-back measurement method (one of the two permissible methods for determining full-time employee status). If you are not an ALE for a particular year, you do not need to identify full-time employees using the separate definition of seasonal employee.

Source: Thomson Reuters/EBIA