



COMPLIANCE SERVICES **ALERT** LOCKTON BENEFIT GROUP



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Clarion Call: IRS Issues Draft Instructions for 2015 ACA Reporting Forms; Final Documents Due Shortly

With early 2016 filing deadlines looming, the IRS recently issued *draft* instructions for the filing of four key reporting forms related to the Affordable Care Act's (ACA's) individual and employer mandates. The draft instructions serve as a reminder, for those who have begun preparing for ACA reporting, that the deadline is drawing slowly but inexorably nearer. The draft instructions are a call to action for employers who have not yet begun to prepare.

Background

The ACA requires all but the smallest employers to provide a new tax form, Form 1095-C, to each of their employees who were full-time for at least one month in 2015. The form shows the extent to which the employer met the ACA's employer mandate in 2015 with respect to that particular employee.

Lockton comment: Employers that dodged the employer mandate's health insurance coverage obligation in 2015 because they had between 50-99 full-time and full-time equivalent employees during the relevant lookback period in 2014 are nevertheless required to comply with the employer mandate reporting obligation for 2015.

In addition, insurers, employers offering self-insured medical coverage, and certain other health plans must provide to employees, retirees and other "primary insureds" a record of their and their dependents' medical coverage in 2015. The recipients of these forms will use them to substantiate, on their 2015 federal tax returns, their compliance with the ACA's individual mandate. If an employee received self-insured coverage, the employer reports it on a Form 1095-C. If an insurer supplied the coverage, it reports it on a Form 1095-B. See the grid at the end of this Alert.

Lockton comment: Employees who were not full-time for at least a month in the reporting year, and not enrolled in coverage, receive neither a Form 1095-C or 1095-B even if offered coverage that they declined. That's curious, because some offers of coverage disqualify them from eligibility for subsidized coverage in a public health insurance exchange, something the IRS should want to know.

These forms are due to employees and other primary insureds by Feb. 1, 2016. Copies are due to the IRS by Feb. 29 if filed on paper or March 31 if filed electronically. The copies are accompanied by a Form 1094-B or 1094-C.

We wrote last [October](#) and [February](#) about the IRS's instructions related to the draft and final 2014 versions of these forms. The IRS's recent draft instructions for the [2015 Forms 1094-C and 1095-C](#), and [1094-B and 1095-B](#), follow closely on the heels of the Service's release of the draft 2015 reporting forms themselves, and provide several noteworthy clarifications. We won't endeavor here to rehash the entire reporting scheme; rather, this Alert will point out several important changes, clarifications or points of emphasis in the 2015 draft forms and instructions.

Lockton comment: For Lockton clients there is much more headed your way in the coming days and weeks regarding ACA reporting, including an Employer's Guide to ACA Reporting, an Oct. 15 [webcast](#), and other communications.

From the employer's perspective, the grid at the end of this Alert provides a snapshot of which forms the employer prepares and files, and which forms will be prepared and filed by insurers.

2015 Draft Instructions: The Highlights

Extensions, Waivers and the "Good Faith" Standard

The draft instructions make clear:

- Employers and insurers may obtain an automatic 30-day extension from the Feb. 29 and March 31 deadlines to supply copies of the relevant forms to the IRS. The extension is claimed on [Form 8809](#), and must be filed before the original due date. An additional 30-day extension may be obtained, at the IRS's discretion, with a second Form 8809 filing that provides information showing hardship.

Lockton comment: The automatic 30-day extension does not apply to the Feb. 1, 2016, deadline to supply the relevant forms to employees and other individuals, as applicable. A 30-day extension for this deadline is available at the IRS's discretion, upon a showing of good cause. The employer or insurer requests the relief in a letter to the IRS, at an address shown in the [draft instructions](#).

- Although employers and insurers submitting 250 or more forms are required to submit them electronically to the IRS, they may apply for a waiver from the e-filing obligation, provided they submit the request at least 45 days prior to March 31. Approval of the waiver is not automatic. Employers and insurers with a waiver file their forms on paper, presumably by Feb. 29 unless they obtain an extension. Employers required to file electronically but that instead file on paper, without a waiver, face a penalty of up

to \$250 per return, although it appears the IRS will not penalize the first 250 paper returns.

Lockton comment: Larger employers that have concerns about filing electronically should apply for a waiver and submit Form 8809 by Feb. 15. The waiver buys them the right to submit their forms to the IRS on paper, and the 30-day extension buys them until March 30 to do that.

- The IRS does not intend to levy penalties for incorrect or incomplete filings for 2015 if the employer or insurer filed on time and can show it made a good faith effort to comply with the filing obligation. This does not give employers relief for filing late nor does it provide relief from employer mandate penalties.

Corrected Filings

The IRS laid out in a handy table, on pages 4-5 of the [draft instructions](#), how to submit corrected reporting forms.

Lockton comment: Many employers will become intimately familiar with the process for submitting corrected forms, and not only because the initial filings for 2015 are likely to be the fruit of significant chaos. The filing process lends itself to the need to make corrections rather routinely.

For example, suppose an employee experiences a COBRA qualifying event late in a calendar year. He or she might not elect COBRA coverage until after receiving his or her Form 1095-C for that year, and the form will likely show no coverage or no coverage offer for the last month or two of the year, the period encompassing the COBRA notice and election period. If the employee elects and pays for COBRA, restoring coverage retroactively, presumably the IRS will want a corrected Form 1095-B and/or 1095-C, depending on the circumstances.

COBRA Coverage

Speaking of COBRA coverage, the draft instructions *finally* get around to telling us something about how to deal with COBRA coverage on Form 1095-C.

Lockton comment: Other important guidance is contained in [FAQs](#) issued by the IRS; see FAQs 16-18.

If a covered full-time employee terminates employment and *elects* COBRA coverage for the remainder of the calendar year, the offer of COBRA coverage is reported on line 14 of Form 1095-C, and the fact of coverage is reported on line 16, just as if the employee had not terminated. On line 15, where the cost of coverage is reported, the employer reports the COBRA premium for the lowest cost self-only coverage providing minimum value, for the months the former employee bought COBRA coverage during the year.

If that employee declines COBRA coverage for the remainder of the year, the employer inserts code 1H (no offer of coverage) on line 14 for the months following the qualifying event, and code 2A (not an employee for any part of the month) on line 16.

For the calendar year *after* termination of employment, the employer supplies a Form 1095-C only if the COBRA coverage was supplied by a self-insured plan of the employer. In that case, the employer reports the months of coverage in Part III of Form 1095-C, and inserts code 1G on line 14 in Part II, to indicate that he or she was not a full-time employee at any point during the year.

Employees in a "Limited Non-Assessment Period"

Employers won't report on some employees even if they worked full-time hours for at least a portion of the year. If an employee is not covered under a self-insured plan of the employer (which would require reporting of coverage in Part III of Form 1095-C) at any point during the calendar year, and is not considered a full-time employee for any month of the year because the employee is in a "limited non-assessment period," no Form 1095-C is required for the employee for that year.

For employers using the lookback measurement method to determine an employee's full-time status, a "limited non-assessment period" includes the first three full calendar months of employment (for new full-time employees) and the entire initial measurement and administrative periods (for new variable hour, part-time and seasonal employees).

Affordability Safe Harbors

To satisfy what we call "Tier 2" of the employer mandate, an employer's offer of employee-only coverage to a full-time employee must be "affordable." Under the ACA, "affordability" means the coverage doesn't cost more than 9.5 percent of the employee's household income (basically, adjusted gross income). But the 9.5 percent is adjusted for inflation; the target for 2015 is 9.56 percent of household income, and 9.66 percent for 2016.

Federal authorities created three affordability "safe harbors" in the final employer mandate regulations: a W-2 safe harbor, a rate-of-pay safe harbor, and a poverty level safe harbor. The safe harbors apply the 9.5 percent standard, begging the question: Are the safe harbor thresholds also adjusted for inflation?

In the draft instructions the IRS says, "not yet." At least for 2015, the affordability safe harbors are applied by using 9.5 percent of W-2 pay, hourly rate of pay, and the mainland poverty level, as applicable.

Spousal Coordination

More and more employers are treating spouses of employees as ineligible if the spouse has an offer of coverage elsewhere, such as through the spouse's employer. On line 14 of Form 1095-C the employer must indicate whether, with respect to a full-time employee, the employee offered employee-only coverage, employee-plus-spouse coverage, employee-plus-children coverage or family coverage.

The draft instructions say that if an offer of coverage to an employee's spouse is conditioned upon the spouse meeting a reasonable, objective condition (e.g., not having an offer through his or her own employer) the employer may report that it offered coverage to the spouse even if it actually did not do so because the spouse failed to meet that condition.

Reporting HRA Coverage

Here's some potentially bad news for health reimbursement arrangement (HRA) sponsors.

Under 2013 IRS guidance, an HRA for active employees is permissible only if the HRA is "integrated" with more substantial medical coverage. Typically, we now see HRAs offered in conjunction with major medical coverage, to reimburse out-of-pocket medical expenses such as those incurred below the medical coverage's deductible. In this context, the HRAs merely supplement the medical coverage.

Under the IRS's final regulations addressing the ACA's reporting obligation, coverage that is considered "supplemental" to other minimum essential coverage of the same plan sponsor need not be reported. This makes sense, because the insurer or self-insured sponsor of the other minimum essential coverage will report the employee's enrollment under *that* coverage, demonstrating the employee's compliance with the ACA's individual mandate requirement that he or she have minimum essential coverage. There's no point in reporting a second layer of minimum essential coverage, i.e., the HRA's coverage.

But the IRS has muddled its message in the draft 2015 instructions to Form 1095-B. There, the IRS says that additional coverage is only supplemental if it's offered by the *same reporting entity* that reports on the coverage being supplemented.

The problem with this charming caveat, if it survives in the final version of the instructions, is that if an employer offers a self-insured HRA to supplement an *insured* medical program, it will now have to complete Parts I, II *and III* of Form 1095-C for full-time employees covered by the HRA. It will also need to complete Form 1095-C for non-full-time employees covered by the HRA, *simply to report the HRA coverage*. This is required even though the insurer will issue the same employee a Form 1095-B showing his or her fully-insured minimum essential coverage, sufficient to satisfy the individual mandate.

Lockton comment: In addition, an employer too small to be subject to the employer mandate, and issuing no Forms 1095-C even to full-time employees, but offering fully-insured coverage with a tandem self-insured HRA, will have to provide covered employees a Form 1095-B showing the HRA coverage (the employer uses the 1095-B rather than 1095-C because it is too small to be subject to the employer mandate). We hope the IRS steps away from this ledge when it finalizes the instructions.

Multiemployer Plan Coverage

The draft instructions supply a new rule that will allow employers with collectively bargained employees to breathe a sigh of relief.

Under the final employer mandate regulations, where a full-time employee is a member of a collective bargaining unit and the employer is required by the collective bargaining agreement to make contributions to a multiemployer (i.e., union-affiliated) plan on the employee's behalf, a special rule applies to the employer.

The employer won't be penalized for not making its own offer of coverage to the bargaining unit employee, as long as the multiemployer plan supplies minimum value (at least 60 percent actuarial value) and affordable coverage to the employee, and offers coverage to his or her children through the month the children attain age 26. The employer may claim this relief for

a given month on account of its obligation to contribute to the multiemployer plan, even if the employee is not actually eligible for the multiemployer plan coverage for that month.

The IRS had hinted for a while that although the employer could claim this relief without regard to whether the employee was actually eligible for the multiemployer plan coverage, the IRS still needed to know whether the employee was eligible, because eligibility would affect the employee's ability to claim subsidies in an online public health insurance marketplace. The IRS had said it wanted *the employer* to report the employee's eligibility. That, of course, would require the employer and the multiemployer plan to share monthly eligibility data.

In the draft 2015 instructions the IRS says it won't make the employer do that...yet. Although the draft instructions are a bit vague in some respects, it appears the employer may use code 1H (no offer of coverage) on line 14 of Form 1095-C, and code 2E (multiemployer plan relief) on line 16 to explain why there was no offer of coverage from the employer. Although for 2015 the IRS won't make the employer report on the employee's *eligibility* under the multiemployer plan, the IRS might require that reporting in future years.

Controlled Group Coverage

Employer reporting under the ACA is generally an EIN-by-EIN affair. Each employer subject to the employer mandate reports separately on coverage offers made to its full-time employees. If the employer offers self-insured coverage, it also reports the months of coverage supplied to enrolled employees and their dependents.

Lockton comment: Although the filing obligation applies on an EIN-by-EIN basis, governmental employers enjoy some flexibility under the rules to designate another governmental entity as a filing proxy.

What if the employer offers its employees coverage under a plan sponsored by an affiliate in the employer's controlled group of businesses? What if the coverage is self-insured? Who reports what?

The employer treats the coverage as its own. It reports the offer of coverage to its full-time employees in Part II of Form 1095-C. If the coverage is self-insured, the employer—not the affiliated plan sponsor—completes Part III of Form 1095-C for the employer's enrolled employees.

Multiple Employer Welfare Arrangement Coverage

Some employers participate in self-insured multiple employer welfare arrangements (MEWAs). Insurance laws in most states make it difficult for these self-insured MEWAs to operate for extended periods; these self-insured MEWAs typically exist for a few weeks or months following a corporate transaction, such as where a company sells a subsidiary or some assets but agrees to cover the transferring employees for a few weeks or months under the seller's self-insured plan.

The draft instructions make clear that the employers whose employees are covered by the self-insured MEWA (i.e., not the seller or plan sponsor in the example above) have the obligation to report that coverage with regard to their respective employees.

Lockton comment: It is as though each participating employer in the self-insured MEWA is said to maintain, and therefore must report coverage under, its own self-insured plan equal to its respective piece of the larger MEWA pie.

What Next?

Over the coming weeks the IRS will finalize the 2015 ACA reporting forms and instructions. Once finalized, the reporting games will commence in earnest. There is much to learn and much to do, and the clock is ticking.

Ed Fensholt, J.D.
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How is Reporting Accomplished?

	1095-B	1094-B	1095-C	1094-C
Employer subject to the employer mandate* offers insured coverage	No (insurer prepares and files)	No (insurer prepares and files)	Yes, for full-time employees (Parts I and II)	Yes
Employer subject to the employer mandate* offers self-insured coverage	Yes, for primary insureds who are not employees, unless for them the employer prepares 1095-C (Parts I and III, and an abbreviated entry in Part II)	Yes, if providing any 1095-Bs	Yes, for any: <ul style="list-style-type: none"> Covered full-time employees (Parts I, II and III) Non-covered full-time employees (Parts I and II) Covered non-full-time employees (Parts I, III and an abbreviated entry in Part II) 	Yes
Employer not subject to the employer mandate* offers insured coverage	No (insurer prepares and files)	No (insurer prepares and files)	No	No
Employer not subject to the employer mandate* offers self-insured coverage	Yes, for any primary insureds	Yes, if providing any 1095-Bs	No	No

* Without regard to an exemption, e.g., 2015 transition relief for employers with 50-99 full-time and full-time equivalent employees over the relevant 2014 assessment period.



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