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United States Senate

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WASHINGTON, DC 20510-6200

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November 16, 2015

The Honorable Sylvia Burwell
Secretary
U.S. Department of Health & Human Services
330 Independence Avenue, SW
Washington, DC 20201

Dear Secretary Burwell,

Under the Patient Protection and Affordable Care Act (PPACA), the Department of Health and Human Services (“HHS”) is required to notify an employer when an employee is determined by an Exchange to be eligible for advanced payment of premium tax credits or cost-sharing reductions (the “exchange notice”). The exchange notice is important because it triggers an appeals process, which allows an employer to provide additional information about available employer sponsored health coverage to the Exchange. This notice and appeals process is intended to prevent individuals from facing significant tax credit repayments when the Exchange makes an inaccurate eligibility determination based on the availability of employer health coverage.

On March 27, 2012, HHS laid out its requirements for the exchange notice and appeals process in final regulations and updated the requirements twice in 2013¹. The regulations highlighted the crucial role the notices play in protecting low and moderate income individuals stating:

This process will help to minimize the employee’s potential liability to repay advance payments of the premium tax credit that he or she was not eligible to receive, and will help to protect the employer from being incorrectly assessed a tax penalty.

The first exchange notices and appeals process should have been issued in January 2014, when the exchange began issuing advanced premium tax credits. Some states with state based exchanges began issuing notices. On October 23, 2014, HHS issued a notice making the appeals process optional for state based exchanges, indicating the federal process would be executed with paper notices and delaying the appeals process for the federally facilitated Exchange until 2015. Consequently, employers that want to help employees avoid preventable tax penalties prepared

¹ See 45 CFR 155.310(h); 45 CFR 155.555.

to receive and respond to Exchange notices beginning in January 2015. Employers waited, but did not receive any notices from the federally facilitated Exchange.

On July 28, 2015, in testimony before the House Education and Workforce Committee, you responded to a question about the delay in the Exchange notice and appeals process by stating that you were “not specifically familiar” with this important requirement under PPACA, but that you agreed that it is HHS’s role to make sure “if the employee makes a choice to not accept the employer coverage that they don’t receive a subsidy that they shouldn’t.”

This response exposed a hole in the verification process and a need for more upfront verification of employer sponsored insurance. We hope your office will focus on the critical role of these notices in the subsidy verification and eligibility determination process.

Finally, on September 18, 2015, HHS issued a FAQ delaying the exchange notice and appeals process until an unspecified time in 2016 when notices will be sent via the postal service. The FAQ also indicated that the notices would not be sent concurrent with the tax-credit eligibility determination- but at some time later “in batches.”² This will increase tax liability for low and moderate income individuals who must pay a tax penalty for each month that they receive an advanced premium tax credit for which they are ineligible.

To assist the Committee in its oversight of this matter, I ask that you answer the following questions by no later than Friday, December 4, 2015:

- 1) How many exchange notices has HHS or the Federally Facilitated Exchange issue to employers as required under Section 1311(d)(4)(J)(i) of PPACA?
- 2) What date will HHS begin issuing the required notices?
- 3) How will HHS assure that the notices are timely and will be delivered to the appropriate employer and identify the correct employee?
- 4) What process will HHS implement to ensure that employees are reporting the employers EIN and correct address?
- 5) Is the Administration considering a grace period from tax penalty for employees if an exchange incorrectly determined that such employee was eligible for an Advanced Premium Tax credit, and did not send a notice to an employer to confirm the individual’s eligibility?
- 6) If HHS is holding the notices and mailing them in batches after open enrollment, taxpayers may owe penalties for the months HHS failed to notify them of HHS’ mistake. How will you help these taxpayers?
- 7) How will HHS identify employers for whom they do not have a full address?

² See <https://www.cms.gov/CCIIO/Resources/Fact-Sheets-and-FAQs/Downloads/Employer-Notice-FAQ-9-18-15.pdf> .

- 8) What will be the process for notifying employees that they were erroneously deemed eligible and prevent further tax penalty risk for individuals?
- 9) What procedures will HHS have in place to update the system to prevent future inaccurate reenrollment of ineligible individuals? Will the exchanges reverify the availability of employer sponsored insurance before automatically reenrolling individuals into exchange coverage?
- 10) Each month that an individual receives a premium tax credit, for which they are ineligible, it increased their tax penalty. How soon after the 90 day appeals process ends will HHS terminate the tax credit for ineligible individuals?
- 11) Did HHS consider the impact on individual tax payers when deciding to rely on paper notices and the US Postal service over a more modern automated approach that would increase accuracy and reduce the time ineligible individuals are subject to tax penalties? Did HHS consider the impact on employers who are trying to respond to notices in order to assist employees?

Thank you for your increased attention to this issue of importance to employers and individuals. I look forward to your prompt response. Please reach out to Chris Armstrong of my Committee staff should you have any questions on this request.

Sincerely,



Orrin G. Hatch
Chairman