



# COLBURN GROUP I N S U R A N C E

## Potential Penalties for Employers under the “Pay or Play” Rules

The Affordable Care Act (ACA) brings many changes to employers and health plans. One such change essentially amounts to a requirement for some employers to offer a certain level health care coverage to their employees or face penalties.

ACA does not explicitly mandate an employer to offer employees acceptable health insurance. However, beginning in 2014, certain employers with at least 50 full-time equivalent employees will face penalties if one or more of their full-time employees obtains a premium credit through an exchange. As described in greater detail below, an individual may be eligible for a premium credit either because the employer does not offer coverage or the employer offers coverage that is either not “affordable” or does not provide “minimum value.”

This Colburn Group Legislative Brief summarizes ACA’s potential penalties applicable to employers with respect to providing health coverage for employees.

### APPLICATION ONLY TO “LARGE EMPLOYERS”

Only a large employer may be subject to penalties regarding employer-sponsored health insurance. A “large employer” is an employer with **at least 50 full-time equivalent employees** during the preceding calendar year.

In order to determine whether an employer is a large employer, both full-time and part-time employees are included in the calculation. Full-time employees are those working an average of 30 or more hours per week. The number of full-time employees excludes full-time seasonal employees who work for less than 120 days during the year. The hours worked by part-time employees (that is, those working less than 30 hours per week) are included in the calculation of a large employer, on a monthly basis, by taking their total number of monthly hours worked divided by 120.

**Example.** A company has 35 full-time employees (30+ hours). In addition, the company has 20 part-time employees who all work 24 hours per week (96 hours per month). These part-time employees’ hours would be treated as equivalent to 16 full-time employees, based on the following calculation:

$$20 \text{ employees} \times 96 \text{ hours}/120 = 1920/120 = 16$$

This company would be considered a large employer, based on a total full-time equivalent count of 51. That is, 35 full-time employees plus 16 full-time equivalents based on part-time hours.

Table 1 on the next page illustrates whether certain groups of employees are counted in determining whether an employer is a large employer and whether they are included in any penalty calculation.



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Table 1. Determination and Potential Application of Employer Penalty for Categories of Employees

Employee category	How is this category of employee used to determine “large employer”?	Once an employer is determined to be a large employer, could the employer be subject to a penalty if this type of employee received a premium credit?
Full-time	Counted as one employee, based on a 30-hour or more work week	Yes
Part-time	Pro-rated (calculated by taking the hours worked by part-time employees in a month divided by 120)	No
Seasonal	Not counted, for those working less than 120 days in a year	Yes, for the month in which the seasonal worker is full-time
Temporary Agency	Generally, counted as working for the temporary agency (except for those workers who are independent contractors)	Yes, for those counted as working for the temporary agency

## POTENTIAL TAX PENALTIES IN 2014 ON LARGE EMPLOYERS

Regardless of whether or not a large employer offers coverage, it will be potentially liable for a penalty beginning in 2014 **only if** at least one of its full-time employees obtains coverage through an exchange and receives a premium credit. A full-time employee includes only those individuals working 30 hours per week or more.

As shown in Table 1, part-time workers are *not* included in penalty calculations, even though they are included in the determination of whether an employer is a large employer. An employer will not pay a penalty for any part-time worker, even if that part-time worker receives a premium credit.

Conversely, seasonal workers are not included in the determination of large employer. However, if an employer is determined to be a large employer, without counting its seasonal workers, it could still potentially face a penalty for each month that a full-time seasonal worker received a premium credit for exchange coverage.

Beginning in 2014, individuals who are not offered employer-sponsored coverage and who are not eligible for Medicaid or other programs may be eligible for premium credits for coverage through an exchange. These individuals will generally have income between 138 percent and 400 percent of the federal poverty level (FPL).

Individuals who are offered employer-sponsored coverage can only obtain premium credits for exchange coverage if, in addition to the other criteria above, they also are not enrolled in their employer’s coverage, and their employer’s coverage meets either of the following criteria:

- The individual’s required contribution toward the plan premium for self-only coverage exceeds 9.5 percent of their household income; OR
- The plan pays for less than 60 percent, on average, of covered health care expenses.

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# Potential Penalties for Employers under the “Pay or Play” Rules

Other ACA provisions will also affect whether full-time employees obtain premium credits for exchange coverage. For example, exchanges are required to have “screen and enroll” procedures in place for all individuals who apply for premium credits. This means that individuals who apply for premium credits must be screened for Medicaid and the State Children’s Health Insurance Program (CHIP) and, if found eligible, are to be enrolled in those programs. Exchange premium credits will not be an option. This could affect whether any of an employer’s full-time employees obtain premium credits in an exchange, and if so, how many.

## ***Penalty for Large Employers Not Offering Coverage***

Beginning in 2014, a large employer will be subject to a penalty if any of its full-time employees receives a premium credit toward their exchange plan. In 2014, the monthly penalty assessed on employers that do not offer coverage will be equal to the number of full-time employees (minus 30) multiplied by 1/12 of \$2,000 for any applicable month. After 2014, the penalty amount would be indexed by the premium adjustment percentage for the calendar year.

## ***Penalty for Large Employers Offering Coverage***

Employers that do offer coverage may still be subject to penalties if at least one full-time employee obtains a premium credit in an exchange plan because the employer’s coverage is unaffordable or insufficient. To trigger a penalty, the employee’s required contribution for self-only coverage must exceed 9.5 percent his or her household income, or the employer’s plan must pay for less than 60 percent of covered expenses. According to the Congressional Budget Office (CBO), about 1 million individuals per year will enroll in an exchange plan and receive a credit because their employer’s plan was unaffordable.

***Note: The IRS has provided an “affordability safe harbor” for employers that offer health coverage, which is available through at least the end of 2014. Under the safe harbor, an employer’s coverage will be considered affordable for a particular employee if the employee’s cost for single coverage does not exceed 9.5 percent of the employee’s W-2 wages (reported in Box 1 of the employee’s Form W-2) and the employer meets all other requirements. Premium credit eligibility will still be based on household income, but the employer will not be subject to a penalty for that employee, even if he or she ultimately receives a premium credit.***

In 2014, the monthly penalty assessed on an employer for each full-time employee who receives a premium credit will be 1/12 of \$3,000 for any applicable month. However, the total penalty for an employer would be limited to the total number of the company’s full-time employees (minus 30), multiplied by 1/12 of \$2,000 for any applicable month. After 2014, the penalty amounts would be indexed by the premium adjustment percentage for the calendar year.

## ***Automatic Enrollment Requirement***

Companies with more than 200 full-time employees that offer coverage must automatically enroll new full-time employees in a plan (and continue enrollment of current employees). Automatic enrollment programs will be required to include adequate notice and the opportunity for employees to opt out. Most of the provisions discussed in this Legislative Brief are not effective until 2014, but this particular provision could be in effect as soon as regulations are issued. However, the Department of Labor (DOL) has indicated that this provision will most likely not go into effect before 2014.

## ***Examples***

Table 2 shows four types of scenarios reflecting health coverage offerings of four large employers (columns A through D) and whether any employer penalty applies. In these large-employer scenarios, the employer size is assumed to remain constant, at 50 full-time employees, throughout the year. The table provides examples of the penalty consequences based on whether the employer offers coverage and whether an employee receives a premium credit.

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The four scenarios are:

*Scenario A* - The large employer does not offer coverage, but no full-time employees receive credits for exchange coverage. No penalty would be assessed.

*Scenario B* - The large employer does not offer coverage, and one or more full-time employees receives credits for exchange coverage. The annual penalty calculation is the number of full-time employees minus 30, times \$2,000. In this example (50 full-time employees), the penalty would not vary if only one employee or all 50 employees received the credit. The employer’s annual penalty in 2014 would be  $(50-30) \times \$2,000$ , or \$40,000.

*Scenario C* - The large employer offers coverage and no full-time employees receive credits for exchange coverage. No penalty would be assessed.

*Scenario D* - The large employer offers coverage, but one or more full-time employees receive credits for exchange coverage. The number of full-time employees receiving the credit is used in the penalty calculation for an employer that offers coverage. The annual penalty is the lesser of:

- The number of full-time employees, minus 30, multiplied by \$2,000 – or \$40,000 for the employer with 50 full-time employees; or
- The number of full-time employees who receive credits for exchange coverage, multiplied by \$3,000.

Although the penalties are assessed on a monthly basis (with the dollar amounts above divided by 12), this example uses annual amounts, assuming the number of affected employees is the same throughout the year.

If the employer with 50 full-time employees had 10 full-time employees who received premium credits, then the potential annual penalty on the employer for those individuals would be \$30,000. Because this is less than the overall limitation for this employer of \$40,000, the employer penalty in this example would be \$30,000.

However, if the employer with 50 full-time employees had 30 full-time employees who received premium credits, then the potential annual penalty on the employer for those individuals would be \$90,000. Because \$90,000 exceeds this employer’s overall limitation of \$40,000, the employer penalty in this example would be limited to \$40,000.

See below for Table 2, Potential Annual Penalties Beginning in 2014 for Large Employers.

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**Table 2. Potential Annual Penalties Beginning in 2014 for Large Employers**

Applies to For-Profit and Nonprofit Organizations

Not a large employer: less than 50 full-time equivalent employees	Large employer: 50 or more full-time equivalent employees			
	<u>Does not offer coverage</u>		<u>Offers coverage</u>	
	<b>A</b> No full-time employees get credits for exchange coverage	<b>B</b> 1 or more full-time employees get credits for exchange coverage	<b>C</b> No full-time employees get credits for exchange coverage	<b>D</b> 1 or more full-time employees get credits for exchange coverage
No penalty	No penalty	Number of full-time employees minus 30 multiplied by \$2,000  (Penalty is \$0 if employer has 30 or fewer full-time employees)	No penalty	Lesser of:  Number of full-time employees minus 30, multiplied by \$2,000.  Number of full-time employees who get credits for exchange coverage, multiplied by \$3,000.  (Penalty is \$0 if employer has 30 or fewer full-time employees)

## FREE CHOICE VOUCHERS

*Note: the free choice voucher provision was repealed on April 15, 2011. The repeal was included in H.R. 1473, the Department of Defense and Full-Year Continuing Appropriations Act. The section below describes the free choice voucher program that was included in ACA and would have taken effect in 2014.*

An employer who offers minimum essential coverage and pays any portion of the premium must provide free choice vouchers to each qualified employee. A qualified employee is defined as an employee:

- Whose required contribution to the employer plan for self-only coverage is greater than 8 percent and less than 9.8 percent of the employee’s household income for the taxable year;
- Whose household income is not greater than 400 percent of the FPL for the relevant family size; and
- Who does not participate in the plan offered by the employer.

The voucher will be equal to the monthly amount that the employer would have contributed toward the plan for which the employer pays the largest portion of plan costs, for either self or, if elected by the employee, family coverage.

An exchange will credit the amount of a voucher to the monthly premium of an exchange plan in which the qualified employee is enrolled, and the employer will pay the exchange the credited amount. If the amount of the

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voucher exceeds the premium, the excess will be paid to the employee. An individual receiving a free choice voucher will not be eligible for the exchange premium credits or cost-sharing subsidies. No penalty will be imposed on an employer with respect to any employee who is provided with a voucher.

## REPORTING AND OTHER REQUIREMENTS

Regulations will be issued requiring employers to provide employees with a written notice regarding coverage at the time of hiring (or no later than March 1, 2013 for current employees). The notice must contain information regarding:

- The existence of an exchange, including services and contact information;
- The employee’s potential eligibility for premium credits and cost-sharing subsidies if the employer plan’s share of covered health expenses is less than 60 percent; and
- The employee’s potential loss of any employer contribution if the employee purchases a plan through the exchange.

Employers will be subject to this requirement beginning March 1, 2013. It is expected that federal agencies will provide a model notice for employers to use.

Beginning in 2014, large employers and offering employers (those who offer minimum essential coverage through an employer sponsored plan and pay for a portion of the costs) will have certain reporting requirements with respect to their full-time employees. They will have to provide a return including:

- The employer’s name, address and employer identification number;
- A certification as to whether the employer offers its full-time employees (and dependents) the opportunity to enroll in minimum essential coverage under an eligible employer-sponsored plan;
- The length of any waiting period;
- Months coverage was available;
- Monthly premiums for the lowest-cost option;
- The employer plan’s share of covered health expenses;
- The number of full-time employees; and
- The name, address and tax identification number of each full-time employee.

Additionally, an offering employer will have to provide information about the plan for which the employer pays the largest portion of the costs (and the amount for each enrollment category). The employer must also provide each full-time employee with a written statement showing contact information for the person required to make the above return, and the specific information included in the return for that individual. An employer may enter into an agreement with a health insurance issuer to provide necessary returns and statements.

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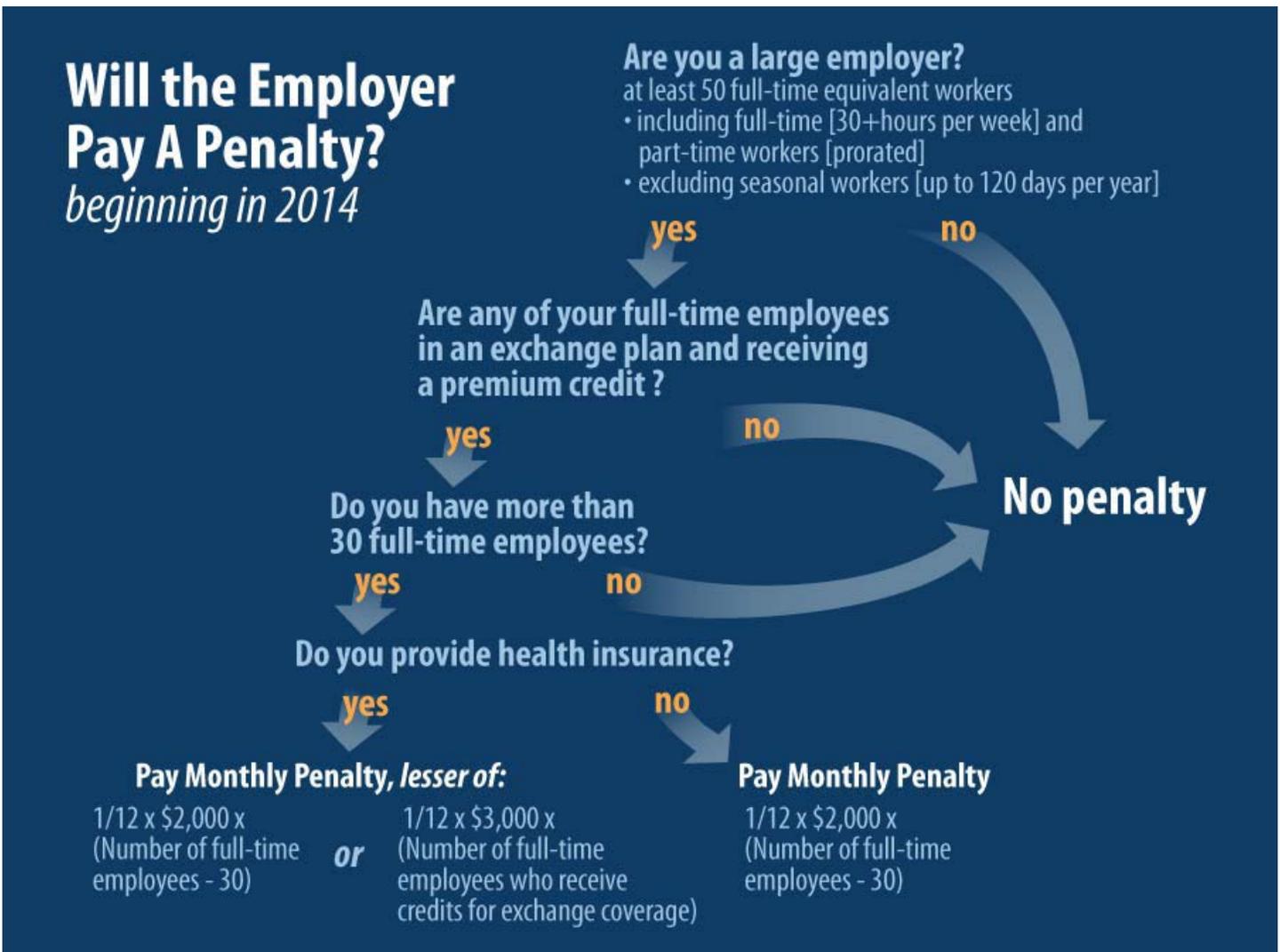
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## Determining If an Employer Will Pay a Penalty



Source: Congressional Research Service

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