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HR News Alert

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Federal Agencies Delay Nondiscrimination Requirements for Insured Group Health Plans under the Affordable Care Act

Insured Group Health Plans Not Required to Comply with Nondiscrimination Rules Prior to Issuance of Administrative Guidance

The Internal Revenue Service (IRS) has issued [Notice 2011-1](#), which delays the requirement under the [Affordable Care Act](#) that non-grandfathered insured group health plans comply with the requirements of IRS Code Section 105(h)(2), prohibiting discrimination in favor of highly compensated individuals, for plan years beginning on or after September 23, 2010.



IRS Instructions for 2011 Payroll Tax Cut and New Income-Tax Withholding Tables Now Available



The [Internal Revenue Service](#) (IRS) has released instructions to help employers implement

What are the nondiscrimination requirements under the Affordable Care Act?

Section 10101(d) of the Affordable Care Act, which adds § 2716 to the Public Health Service Act, provides that a group health plan (other than a self-insured plan) must satisfy the requirements of § 105(h)(2) of the Internal Revenue Code and that 'rules similar to the rules contained in paragraphs (3) [nondiscriminatory eligibility classification], (4) [nondiscriminatory benefits], and (8) [certain controlled groups] of § 105(h) of such Code shall apply.' Section 2716 also provides that the term 'highly compensated individual' has the meaning given by § 105(h)(5). Section 2716 does not apply to grandfathered health plans.

Why has the requirement for compliance with the nondiscrimination rules been delayed?

According to [Notice 2011-1](#), comments received raised fundamental concerns about plan sponsors' ability to comply with § 2716 without

the 2011 cut in payroll taxes, along with new income-tax withholding tables that employers will use during 2011.

The Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010 provides a two percentage point payroll tax cut for employees, reducing their Social Security tax withholding rate from 6.2 percent to 4.2 percent of wages paid. The new law also maintains the income-tax rates that have been in effect in recent years.

- Employers should start using the new withholding tables and reducing the amount of Social Security tax withheld as soon as possible in 2011 but not later than Jan. 31, 2011.

- [Notice 1036](#) contains the percentage method income tax withholding tables, the lower Social Security withholding rate, and related information that most employers need to implement these changes.

- [Publication 15, \(Circular E\), Employer's Tax Guide](#), containing the extensive wage bracket tables that some employers use, is also available on [IRS.gov](#).

The IRS recognizes that the late enactment of these changes makes it difficult for many employers to quickly update their withholding systems. For that reason, the agency asks employers to adjust their payroll systems as soon as possible, but not later than Jan. 31, 2011.

For any Social Security tax over withheld during January, employers should make an offsetting adjustment in workers' pay as soon as possible but not later than March 31, 2011.

For additional information on these changes, please view the IRS news release [here](#). Notice 1036 is available by [clicking here](#). To read more about the Social Security and Medicare

regulatory guidance, including, in particular, guidance regarding the meaning of § 2716(b)(1), which provides that '[r]ules *similar* to the rules contained in paragraphs (3), (4) and (8) of section 105(h) of such Code shall apply' [emphasis added] to insured plans. The § 2716(b)(1) reference to rules 'similar to' means that guidance must specify in what respects insured plans are subject to the same statutory provisions that apply to self-insured plans under § 105(h)(3), (4) and (8) and in what respects insured plans are subject to rules reflecting a different (although 'similar') application of those statutory provisions.

What is the timing of the delay?

Because regulatory guidance is essential to the operation of the statutory provisions, the Treasury Department and the IRS, as well as the Departments of Labor and Health and Human Services (collectively, the Departments), have determined that compliance with § 2716 should not be required (and thus, any sanctions for failure to comply do not apply) until after regulations or other administrative guidance of general applicability has been issued under § 2716.

In order to provide insured group health plan sponsors time to implement any changes required as a result of the regulations or other guidance, the Departments anticipate that the guidance will not apply until plan years beginning a specified period after issuance.

Additional Information

According to [Notice 2011-1](#), the Departments anticipate issuing guidance under § 2716. Additional public comments are requested on the issues that should be addressed in that guidance and on the suggested resolution of those issues. Comments must be submitted by March 11, 2011.

For more information regarding the delay, you may view Notice 2011-1 by [clicking here](#). To read more about the Affordable Care Act, please visit the HR360 website section covering [Health Care Reform](#).

States Adjust Minimum Wage Rates for 2011

The following states have announced an increase in minimum wage rates, effective January 1, 2011:

Arizona: The state minimum wage will increase to \$7.35 per hour.

City of San Francisco, California: The City of San Francisco's minimum wage rate will rise to \$9.92 per hour.

Colorado: The minimum wage will increase to \$7.36 per hour, and \$4.34 for tipped employees.

Montana: The state minimum wage will rise to \$7.35 per hour.

Ohio: The state minimum wage will increase to \$7.40 for non-tipped employees, and \$3.70 for tipped employees. The federal minimum wage of \$7.25 may be paid to employees whose employers gross \$271,000 or less per year.

Oregon: The minimum wage will rise to \$8.50 per hour.

Vermont: The state minimum wage will increase to \$8.15 per hour, and \$3.95 per hour for tipped employees.

Washington: The minimum wage will increase to \$8.67 per hour.



payroll taxes, please visit the HR360 [Social Security](#) Section.

For more information on state minimum wage laws, including poster requirements, please visit the HR360 [State Laws Section](#), click on your state, and select Minimum Wage in the left-hand navigation bar.

Forms and Additional Guidance Now Available on Small Business Health Care Tax Credit

New HHS Rules Require Insurers to Notify Consumers of Lower Annual Limit Coverage; Limit Sale of Mini-Med Plans



The [Department of Health and Human Services](#) (HHS) has released [new guidance](#) affecting limited-benefit health insurance plans. Under the new rules, health insurers offering 'mini-med' plans must notify consumers in plain language that their plan offers extremely limited benefits and direct them to [HealthCare.gov](#) where they can get more information about other coverage options. HHS has also issued guidance restricting the sale of new mini-med plans except under very limited circumstances.

'Mini-Med' Plans and the Affordable Care Act

The Affordable Care Act will end limited-benefit health insurance plans, sometimes called 'mini-med' plans, in 2014. According to HHS, mini-med plans are often the only type of private insurance available to some workers. In order to protect coverage for these workers, HHS has issued temporary waivers from rules restricting the level of annual limits to some group health plans and health insurance issuers. Waivers only last for one year and are only available if the plan certifies that a waiver is necessary to prevent either a large increase in premiums or a significant decrease in access to coverage.

The Internal Revenue Service (IRS) has released [final guidance](#) for small employers eligible to claim the new small business health care tax credit for the 2010 tax year. The release includes a [one-page form](#) and instructions small employers will use to claim the credit for the 2010 tax year.

New [Form 8941](#), Credit for Small Employer Health Insurance Premiums, and newly revised Draft [Form 990-T](#) are now available on IRS.gov. The IRS also posted on its website the [instructions to Form 8941](#) and [Notice 2010-82](#), both of which are designed to help small employers correctly figure and claim the credit.

What is the small business health care tax credit?

Included in the Affordable Care Act enacted in March, the small business health care tax credit is designed to encourage both small businesses and small tax-exempt organizations to offer health insurance coverage to their employees for the first time or maintain coverage they already have. In general, the credit is available to small employers that pay at least half of the premiums for single health insurance coverage for their employees. It is specifically targeted to help small businesses and tax-exempt organizations that primarily employ moderate- and lower-income workers.

Small businesses can claim the credit for 2010 through 2013 and for any two years after that.

- For tax years 2010 to 2013, the maximum credit is 35 percent of premiums paid by eligible small businesses and 25 percent of premiums paid by eligible tax-exempt organizations.
- Beginning in 2014, the maximum tax credit will increase to 50 percent of premiums paid by eligible small business employers and 35 percent of premiums paid by eligible tax-exempt organizations.

The maximum credit goes to smaller employers - those with 10 or fewer full-time equivalent (FTE) employees - paying annual average wages of \$25,000 or less. The credit is completely phased out for employers that have 25 or more FTEs or that pay average wages of \$50,000 or more per year. Because the eligibility rules are based in part on the number of FTEs, not the number of employees, employers that use part-time workers may qualify even if they employ more than 25 individuals.

What information does the new guidance include?

The new guidance addresses small business questions about which firms qualify for the credit by clarifying that a broad range of employers meet the eligibility requirements, including religious institutions that provide coverage through denominational organizations, small employers that cover their workers through insured multiemployer health and welfare plans, and employers that subsidize their employees' health care costs through a broad range of contribution arrangements.



New Rules Increase Transparency for Consumers

The [new guidance](#) issued by HHS requires health plans with waivers to tell consumers if their health care coverage is subject to an annual dollar limit lower than what is required under the law. Specifically, the notice must include the dollar amount of the annual limit along with a description of the plan benefits to which the limit applies. Model language that shall be used to satisfy the notice requirement can be found [here](#).

[Additional guidance](#) issued by HHS also provides new rules on when mini-med plans can continue to be sold. Under limited circumstances, insurers that have obtained a waiver of the annual limit requirement can sell policies to new employers and individuals.

For more on the Affordable Care Act, please visit the HR360 *Health Care Reform* Section by [clicking here](#).

FLSA Overtime Security Advisor Helps Employers Determine Exempt vs. Non-Exempt Employees



The Fair Labor Standards Act (FLSA) includes minimum wage, overtime pay and child labor protections for workers in the United States. The FLSA has always included exemptions for certain executive, administrative, professional and outside sales workers. More recently, Congress added exemptions for certain types of occupations in the computer field. In order

How does a company claim the tax credit?

- Eligible small businesses will first use [Form 8941](#) to figure the credit and then include the amount of the credit as part of the general business credit on their income tax return.
- Tax-exempt organizations will first use [Form 8941](#) to figure their refundable credit, and then claim the credit on Line 44f of Form 990-T. Though primarily filed by those organizations liable for the tax on unrelated business income, [Form 990-T](#) will also be used by any eligible tax-exempt organization to claim the credit, regardless of whether they are subject to this tax.

Additional Information

- For more information about the credit, including a step-by-step guide to claiming the credit and answers to [frequently asked questions](#), please visit the [Affordable Care Act](#) page on IRS.gov.
- [IRS Notice 2010-82](#)
- [Form 8941](#) and [Instructions to Form 8941](#)
- [Form 990-T](#) (available in draft form)
- [IRS Press Release](#)

For more on the Affordable Care Act, please visit the HR360 *Health Care Reform Section* by [clicking here](#).

Employer Recordkeeping: An Important Tool for Managing Employee Information and Satisfying Legal Obligations

Employers typically keep a number of different employee records (often called personnel files) as a way of documenting an employee's relationship with a company. In certain instances, documentation in a personnel file can provide important supportive data- for example, to show an employee's discipline history in support of a termination in subsequent litigation. The personnel file can also track performance goals, leaves of absence, and any employment-related agreements.



In addition to being a good business practice, employers may be required to keep certain types of employee records in order to comply with specific provisions under both federal and state law. Under the federal Fair Labor Standards Act (FLSA), for instance, nearly all employers are required to keep a set of records that includes basic identifying information about non-exempt employees and data about hours worked and wages earned.

Types of Employee Records

Personnel Files: The following are some examples of the types of records a personnel file may include:

- **Basic Information:** Employee's full name, social security number, address, and birth date.
- **Hiring Documents:** Job descriptions, employment applications, and resumes.
- **Job Performance and Development:** Performance evaluations, corrective action or disciplinary letters, awards, promotion records, and records of education or trainings.

to satisfy the FLSA requirements, it is very important to properly classify your employees as exempt or non-exempt.

The U.S. Department of Labor (DOL) has developed an interactive, web-based tool called the [FLSA Overtime Security Advisor](#), which is intended to help workers and employers identify:

1. Those workers who are entitled to the minimum wage and overtime pay protections of the FLSA; and

2. Those who, by law, are not subject to the FLSA's minimum wage and overtime pay requirements.

Job titles alone do not determine the exempt or non-exempt status of any employee. Each determination is based on the specific job duties performed and compensation received. Therefore, DOL recommends you should run the [Advisor](#) for each specific employee or for each group of employees who perform essentially the same duties and receive essentially the same compensation package.

The FLSA contains several other [exemptions](#) from the minimum wage and/or overtime pay protections which are not covered in this Advisor. For more on other commonly used exemptions, please visit the HR360 [Exempt Employees](#) Section.

- **Employment-Related Agreements:** Employment agreements, union contracts, non-competition agreements, confidentiality or nondisclosure agreements.
- **Compensation:** Documents related to compensation and benefits information, such as W-4's and beneficiary forms, payroll records, and time cards for prior year(s).
- **Termination and Post-Employment Information:** It is a good idea to keep information related to an employee's termination on file should a dispute later arise.

Confidential Files: Certain records should be kept in a confidential file separate from the personnel file, such as:

- Medical records and documents that relate to an injury or disability
- Material relating to Workers' Compensation claims
- Family and Medical Leave documents
- Form I-9's and other employment verification information
- Wage garnishment documentation
- Documents pertaining to sensitive matters, such as harassment investigation records or any information pertaining to an employee's religion (such as a request for Jewish holidays off)

Developing an Effective Recordkeeping Policy

It is important to develop a policy that outlines the procedures for how your company will manage employee records and files. Keep in mind that your policy must comply with federal and state laws. Some states, for instance, require employers to provide employees with access to their files.

Consider the following points when developing your company's employee records policy:

What types of records will be maintained?

- Identify documents and forms that should be kept in either a personnel file or confidential file.
- Establish a regular timeframe for reviewing and updating employment records, as well as for disposing of records that no longer need to be retained.
- Your employee records policy should clearly state which records to maintain and how long certain documents should be kept.

How will employee records be stored?

- Determine what information may be stored electronically as opposed to which records will be maintained in hard copy.
- Keep records, which are required to be kept separate, in separate files.
- Be sure your filing system is compliant with federal and state laws.
- All employee records should be maintained in a locked cabinet or locked office.
- Ensure that a secure procedure is in place for disposing of employee records, such as shredding.

How will access to records be controlled?

- Identify staff who have authorization to access personnel and confidential files. Be sure that safeguards are in place that restrict

access to those individuals. These safeguards can be physical (such as locked cabinets) or technical (such as special username and password access).

- Define the specific circumstances by which an employee may access or copy files, including the specific records which may be reviewed. Files should be accessed under supervision of management.
- Generally, employees should not be permitted to remove or change any documents contained in their personnel files. If an employee disagrees with a record, consider allowing them to submit a written statement regarding the disagreement and adding it to his or her file.
- Develop procedures for handling third party requests for disclosure of employee information, and what information may be released. Consider obtaining the employee's prior written authorization to release such information.

Other Considerations

When collecting and maintaining information to be kept in employee personnel files, you should be careful to comply with all applicable federal and state laws, including any requirements as to what information should be collected, what your company may or may not do with that information, and how long employee records should be kept. For more information, please visit the HR360 *Employee Records and Files* Section by [clicking here](#).

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