

Proposed Regulations Provide Permanent Relief for Expatriate Health Plans

The departments have issued proposed regulations under the Expatriate Health Coverage Clarification Act. The rules provide permanent relief from certain ACA requirements for insured and self-insured plans that qualify as expatriate health plans.

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Background

The Expatriate Health Coverage Clarification Act of 2014 (EHCCA), enacted on December 16, 2014, provides that the Affordable Care Act (ACA) generally does not apply to expatriate health plans, insurance issuers for coverage under expatriate health plans or employers in their capacity as plan sponsors of expatriate health plans. However, the following ACA provisions do apply to expatriate plans: the employer shared responsibility provisions, healthcare information reporting requirements (with some modifications) and the tax on high-cost coverage (or, Cadillac tax). The EHCCA modifies the temporary relief for expatriate health plans previously set out in FAQs (see our [April 26, 2013](#) and [March 11, 2014](#) issues of *For Your Information*) and provides permanent relief for expatriate health plans issued or renewed on or after July 1, 2015.

Following the enactment of EHCCA, the IRS issued [Notice 2015-29](#) and [Notice 2016-14](#) that provide guidance on the EHCCA rule on the health insurance provider's fee imposed by Section 9010 of the ACA. It also issued [Notice 2015-43](#), which generally allows issuers and plan sponsors to use a reasonable, good faith interpretation of the EHCCA until regulations were issued.

Proposed Regulations

The Departments of Labor, Treasury and Health & Human Services (departments) have now issued [proposed regulations](#) under the EHCCA. The departments considered comments to Notice 2015-43 when drafting EHCCA proposed regulations.



Expatriate Health Plan Definition

Consistent with the EHCCA, the proposed regulations define an expatriate health plan as a plan that meets the following requirements:

- Substantially all of the primary enrollees are qualified expatriates. To meet this requirement, at least 95% of the primary enrollees must be qualified expatriates on the first day of the plan year. For this purpose, covered individuals who are not primary enrollees are not taken into account.

Example. A plan covers 250 U.S. citizens who are qualified expatriates working in Country Y and also covers 100 Country Y citizens living in Country Y. The health plan satisfies the “substantially all” test because the 100 Country Y citizens are not primary enrollees and, therefore, 100% of the primary enrollees are qualified expatriates.

- Substantially all of the benefits under the plan are not excepted benefits.

Comment. Noting that commenters asked for clarification on the “substantially all” requirement, the departments requested comments on the threshold of 95% as of the first day of the plan year for purposes of both the enrollees as well as the benefits.

- The plan provides coverage for inpatient hospital services, outpatient facility services, physician services and emergency services in the country in which the individual is present in connection with his or her employment, the country from which the individual was transferred or assigned, and in other countries as designated by the departments.
- The plan sponsor reasonably believes the plan satisfies the ACA minimum value requirements. The plan sponsor may rely on the reasonable representations of the issuer or administrator.
- If the plan covers dependent children, it covers them up to age 26 (except in the case of a child of a child receiving dependent coverage).
- The plan offers reimbursements for items or services in the local currency in eight or more countries.
- The plan is issued by an expatriate health insurance issuer or administered by an expatriate health plan administrator.

More Terms Defined

A **primary enrollee** is an individual covered by the plan whose eligibility for coverage is not due to that individual’s status as the spouse, dependent or other beneficiary of another covered individual. An individual who is not a U.S. national and lives in his or her country of citizenship is excluded.

A **qualified expatriate** can be:

- An individual who is transferred or assigned to the U.S. for a specific and temporary purpose or assignment related to his or her employment and in connection with such transfer or assignment, is determined by the plan sponsor to need access to health insurance and other related services and support in multiple countries.
- A U.S. national working outside the U.S. for at least 180 days in a consecutive 12-month period that overlaps with a single plan year or across two consecutive plan years.
- A member of a group of individuals formed for traveling or relocating internationally for certain educational, social welfare or other purposes, such as a student who is part of a group formed to study abroad for a six-month period.

- The plan complies with certain federal laws in effect prior to enactment of the ACA, including the Women's Health and Cancer Rights Act, the Newborns' and Mothers' Health Protection Act, the Mental Health Parity and Addiction Equity Act, and the HIPAA portability and nondiscrimination rules. This means that an expatriate plan may still impose a pre-existing condition exclusion as permitted by pre-ACA portability rules. Under the proposed regulations, an expatriate health plan is not required to provide certificates of creditable coverage, but must ensure that individuals who enroll in the expatriate health plan have the opportunity to demonstrate creditable coverage to offset any pre-existing condition exclusion. For example, an email from a prior plan sponsor providing information about past coverage would be sufficient.

ACA Implications

The EHCCA provides that the ACA generally does not apply to expatriate health plans that meet the above definition or to employers in their capacity as plan sponsors of those plans.

Consistent with this provision, the proposed regulations specify that the market reform provisions of the ACA, other than the requirement of providing coverage to dependent children up to age 26, do not apply to expatriate health plans or to employers in their capacity as plan sponsors including, for example:

- Prohibition against annual and lifetime limits on essential health benefits
- Coverage of in-network preventive services without cost-sharing
- Provision of Summaries of Benefits and Coverage
- Prohibition against waiting periods over 90 days

Comment. Under pre-EHCCA guidance, only insured expatriate plans were exempt from the ACA. The EHCCA and the proposed regulations make clear that the exemption applies to all plans meeting the definition of expatriate health plan, whether insured or self-insured.

The proposed regulations also address how specific ACA provisions apply to expatriate health plans.

PCORI Fee. The final Patient Centered Outcomes Research Institute (PCORI) fee regulations exempt from the fee health insurance policies or self-insured group health plans designed and issued specifically to cover primarily employees working and residing outside the U.S. The EHCCA proposed regulations expand this exclusion to include all expatriate health plans, regardless of whether the plan provides coverage for qualified expatriates living or working in or outside the U.S.

Comment. This expanded exemption would apply for plan years beginning on or after January 1, 2017. However, Notice 2015-43 permits issuers and plan sponsors to determine the PCORI fee by excluding the

Expatriate Health Insurance Issuer (for insured plans) and Expatriate Health Plan Administrator (for self-funded plans)

- Maintains network provider agreements that provide for direct claims payments with healthcare providers in eight or more countries
- Maintains call centers in three or more countries and accepts calls from customers in eight or more languages
- Processed at least \$1 million in claims in foreign currency equivalents during the preceding calendar year
- Makes global evacuation/repatriation coverage available
- Maintains legal and compliance resources in three or more countries
- Has licenses or other authority to sell insurance in more than two countries, including the U.S.

lives covered under a health insurance policy issued or renewed on or after July 1, 2015, or under a self-funded health plan for plan years starting on or after July 1, 2015, if the policy or plan was designed and issued to cover primarily employees who (1) are working and residing outside the U.S., or (2) are not U.S. citizens or residents, but who are assigned to work in the U.S. for a specific and temporary purpose or for no more than six months of the policy or plan year.

Transitional Reinsurance Fee. Existing regulations on the transitional reinsurance fee include an exception for certain expatriate health plans, including self-insured group health plans for which enrollment is limited to participants who reside outside their home country for at least six months of the plan year. HHS requested comments on whether guidance is needed to clarify that all expatriate health plans are exempt from the transitional reinsurance fee requirement.

Employer Shared Responsibility. The ACA employer shared responsibility requirements apply to applicable large employers who sponsor expatriate health plans. Applicable large employers who don't offer minimum essential coverage (that is affordable and provides minimum value coverage) to substantially all (at least 95% for 2016) full-time employees and their dependents must make an assessable payment. For purposes of this requirement, coverage under an expatriate health plan (as defined under the proposed rules) constitutes minimum essential coverage.

Comment. Under ACA regulations, hours of service worked outside of the 50 U.S. states and the District of Columbia (i.e., where compensation for services constitutes income from sources outside of the U.S.) are not counted, regardless of the individual's residency or citizenship. This means that these employees likely will not have the requisite hours of service to be considered full-time employees and, therefore, would not have to be taken into account in determining whether an employer has offered coverage to substantially all of its full-time employees or in determining the amount of any assessment.

ACA Information Reporting. Because it is considered "minimum essential coverage" for purposes of the individual mandate, the ACA requirements for information reporting of minimum essential coverage apply to expatriate health plan coverage. However, the proposed regulations modify the rules governing the electronic delivery of Forms 1095-B and 1095-C — instead of requiring an individual's affirmative consent to electronic delivery, an individual is treated as having consented unless there is an explicit refusal of electronic delivery. A refusal can be made either electronically or on paper. Additionally, a request for a paper statement is treated as a refusal. The employer must notify employees (at least 30 days before the information statements are due) that the statement will be furnished electronically unless the employee expressly refuses to consent to electronic delivery.

Comment. The departments requested comments on how to limit the burden of this notice requirement and about whether the notice could be provided with enrollment materials.

Cadillac Tax. Although the EHCCA provides that the Cadillac tax applies to employer-sponsored coverage of a qualified expatriate who is "assigned (rather than transferred) to work in the United States", the proposed regulations do not address this issue. Instead, the departments indicated they expect future Cadillac tax guidance will address what the phrase "assigned (rather than transferred) to work in the United States" means.

Health Insurance Provider's Fee. ACA Section 9010 imposes an annual fee on health insurance providers with respect to U.S. health risks. The EHCCA excludes expatriate health plans from this fee for calendar years after

2015 because a qualified expatriate is not considered a U.S. health risk. Consistent with this, the proposed regulations provide that for any fee due on or after the date of the final regulations, a qualified expatriate enrolled in an expatriate health plan is not a U.S. health risk. They also authorize the IRS to specify the manner of determining excluded premiums for qualified expatriates in expatriate health plans.

Effective Date

The regulations are proposed to be effective for plan and policy years beginning on or after January 1, 2017. In the meantime, plan sponsors may rely on the proposed regulations pending final regulations.

In Closing

The EHCCA and these proposed regulations provide relief from some aspects of ACA compliance for both insured and self-insured expatriate health plans. Although these rules are not yet final, plan sponsors of expatriate health plans may want to review their plans and consider whether modifications are needed to comply with the conditions set out in these rules.

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