An Overview of the Family Glitch Final Rule

PRESENTED BY:

Marcy M. Buckner, J.D. – SVP, Govt. Affairs, NAHU
Barb Gerken – SVP, Director of Client Innovation & EB Compliance, First Insurance Group

QUESTIONS?

You may ask your question in the questions box at any time.

The information herein should not be construed as legal or tax advice in any way. Regulations, guidance and legal opinions continue to change. The preparer has gathered public information and has attempted to present it in an easily readable and understandable format. Situations vary, technical corrections and future guidance may vary from what is discussed in the presentation.

This is meant for informational content only. The presenter makes no warranty of any kind concerning this information. You should seek the advice of your attorney or tax consultant for additional or specific information.

This presentation is not to be duplicated or distributed.

Today’s Presenters

- Marcy M. Buckner, J.D., is SVP of government affairs at NAHU. In this role, Marcy manages the association’s government affairs team, including the monitoring of activities of all state legislatures, insurance departments, and intergovernmental organizations. She serves as the association’s liaison to federal agencies such as HHS and CMS.
- With 34 years in the group health insurance market, Barb Gerken is SVP & Director of Client Innovation & EB Compliance at First Insurance Group. She is responsible for agency and client compliance with state and federal regulations affecting employee benefit programs.

AGENDA

- What is the Family Glitch?
- Summary of the final rule
- How did we get here?
- Regulatory process and potential challenges
- Impact on individual market
- Impact on employer market
- Examples
- Timeline
- Questions?

What is the "Family Glitch?"

Current regulations define employer-based health insurance as "affordable" if the coverage for the employee and *only* the employee (not for family members) is affordable – making family members ineligible for a premium tax credit.

Summary of Final Rule

- Change in definition of "affordability"
  - Under final rule, when a family applies for coverage, the exchange will perform the following affordability determinations:
    - One determination for the employee based on the cost of self-only coverage
    - Additional determination for the related individuals based on the cost of family coverage
    - Additional determinations for any related individuals who have an offer of coverage from another employer

Summary of Final Rule

- The rule would also refine the minimum-value rule for family coverage as well as clarify the treatment of rebates for purposes of PTC eligibility.
- Affordability and minimum-value tests would be changed only as they relate to family coverage, *not* employee-only coverage.
  - Would also *not* impact affordability test for employees.
- Employees would still be barred from accessing ACA subsidies if their employer offers affordable employee-only coverage, but their family members would no longer be.

How Did We Get Here?

The interpretation of the ACA that created the family glitch stems from a final rule issued in 2011, in which the IRS cited a 2011 analysis from the Joint Committee on Taxation that interpreted the affordability test to be based on employee-only coverage.

Then, in 2013 Treasury and the IRS released a final regulation that specified that the affordability test for related individuals is based on the cost of employer sponsored self-only coverage for the employee.

Proposed Rule: April 2022

- Treasury and the IRS reexamined the previous interpretation of the 2013 rule and has preliminarily determined that the rule *does not* compel the result that… if self-only employer coverage is affordable for an employee, then the coverage also is affordable for a spouse and any dependents.
- To the contrary, Treasury and the IRS now believe that the statute is better interpreted to require a separate affordability determination for employees and for family members.
- Further, Treasury and the IRS are now of the view that the interpretation in the previous regulations unduly weakens the ACA by basing affordability solely on the premium cost for the employee's self-only coverage.
  - Therefore, the interpretation in the previous regulations is contrary to the policy of the ACA to expand access to affordable healthcare coverage

Regulatory Process and Possible Changes

- Treasury and the IRS believe that the regulation is best interpreted in a manner that requires consideration of the premium cost to the employee to cover not just the employee, but also other members of the employee's family who may enroll in the employer coverage.
- This interpretation would create consistency across parallel provisions of the Code enacted by the ACA, specifically regarding the affordability tests in sections 36B and 5000A.
- Under this alternative reading, affordability of employer coverage for related individuals for employee's family is determined by the cost of covering the employee and related individuals.

Regulatory Process and Possible Changes

- Consequently, Treasury and the IRS are exercising the regulatory authority granted in section 36B(h) to adopt an alternative reading of section 36B(c)(2)(C)(i).
- This could lead to legal challenges, as some critics do not believe these sections of the law grant the administration authority to reinterpret the meaning of the regulation.

Impact on Individual Market

- 5.1 million Americans are impacted by the family glitch, but just 200,000 are expected to gain coverage in the marketplace under the new rule
- Access to tax credits
- Shift in risk to individual market
  - Potential to improve the risk in the individual market since people will be coming from the employer market which is typically made of less sick, less risk averse population
- Premium costs with more lives covered in marketplace
  - With more lives covered, will this drive premiums down in the individual market?
- Will the Medicaid "unwinding" have an impact on participation in the individual market?

Impact on Individual Market

- Type of coverage
- Typically, not as robust as ER plans
- Will this have any impact on action to extend the increase in premium tax credits from ARPA and IRA through 2025?

Split Families

Remember, if the employee spouse has an affordable offer of coverage from the employer, the employee spouse *cannot receive* a subsidy in the exchange. The employee spouse may still waive employer sponsored coverage and go to the exchange with the rest of the employee's dependents, but the employee spouse will not be able to qualify for a subsidy.

This may result in what the final rule calls "split families" with some employee spouses choosing to stay on the employer plan while the dependents may choose to enroll in marketplace plans and potentially receive a subsidy. However, some families may choose to stay together on the employee spouse's plan in order to have one plan with shared deductibles, copays and the same network of providers.

Impact on Employer Market

- Participation Requirements
  - Potential for some employer groups to fail to meet participation requirements if enough spouses and dependents leave ER plan
- Premium costs
  - If large numbers leave ER market, will premiums rise?
- Compliance/Employer Reporting
  - What information will be needed from employers for HHS and the IRS to accurately process spouses and dependents that will now be eligible for tax credits?
- Equity of Benefits to Employees
  - If an employer shifts and provides more coverage for spouses and dependents to keep them on the ER plan, does that cause an imbalance of benefits and pay as compared to employees that are receiving self-only coverage?

Impact on Employer Market

Decreased uptake of employer exclusion for employees who drop employer coverage

If individuals drop their employer coverage to take up Exchange coverage (or do not enroll when they otherwise would have), the amount of money that was going toward their employer coverage (which provides tax-preferred health benefits) will go into the employee's wages, other employees' wages, and employer profits. It will also no longer be tax exempt.

Thus, the proposed regulations may increase the amount of tax revenue received from income and payroll taxes.

Impact on Employer Market

Treasury and the IRS are unable to estimate the size of the population affected by the proposed regulations because contribution amounts for family coverage are not observed in the tax data. The Treasury Department and the IRS request comments that provide data, other evidence, or models that provide insight on this issue

The data needed to complete these projections and to accurately process tax credits for family members may lead to more requirements on employers for reporting

No Changes to Employer Mandate

Throughout the final rule, the IRS responds to each inquiry about the impact the final rule will have on the employer mandate, employer's offer of coverage, employer reporting, and employer shared responsibility requirements by saying that no changes have been made to this section of the law.

Section 125 Plans Notice 2022-41

Allows employers to amend their Section 125 Cafeteria Plans to permit eligible dependents to drop their group coverage midyear in favor of subsidized individual exchange coverage.

According to the new guidance, employers with non-calendar year plans can now allow employees to revoke their family-level (non-health FSA) medical coverage as long as:

- At least one of their dependents wants to enroll in exchange-based coverage, either during the exchange's open enrollment period or because the dependent is eligible for a special enrollment period through the exchange.
- The dependent(s) intend to enroll in exchange-based coverage that starts no later than the day after their coverage under the employer-sponsored plan ends. If the employee doesn't also enroll in exchange-based coverage, they cannot revoke their own employer-sponsored coverage midyear. They, and any other individuals they're covering who don't enroll in coverage through an exchange, will need to maintain enrollment in the employer's plan.

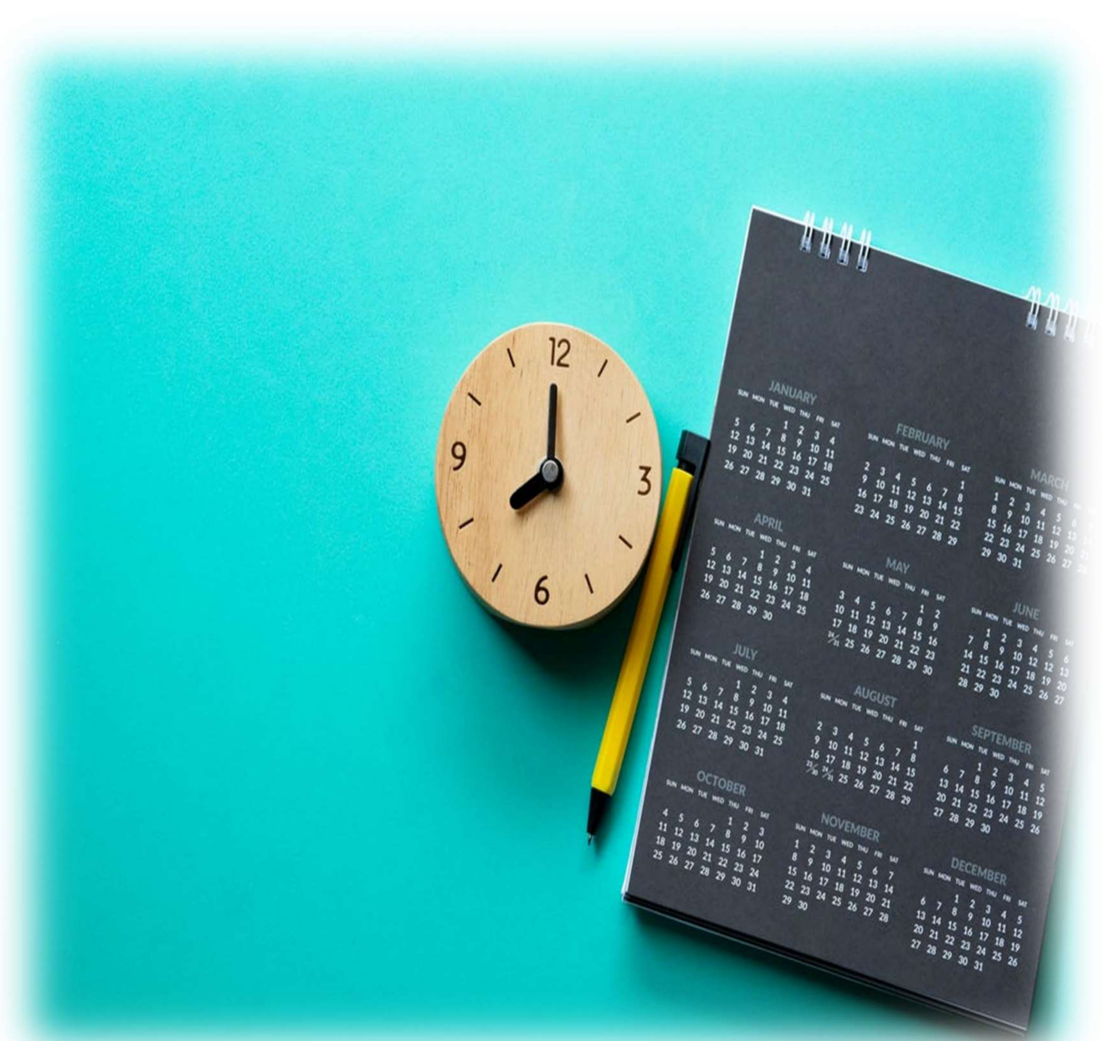
Section 125 Changes

Employers can rely on an employee's attestation as proof that their relative has enrolled or will enroll in exchange-based coverage. Employers are not required to allow these election changes. However, if they wish to permit the changes, they must:

- Inform employees of their right to make a change in accordance with the new rule
- Adopt a formal plan amendment on or before the last day of the plan year in which the election changes are allowed.
  - This amendment may be made retroactively to the first day of the plan year—meaning that election changes can technically be permitted before an amendment to the Cafeteria Plan document is made. Plans cannot be amended to allow an actual election of coverage to be revoked on a retroactive basis.

Timeline

- Proposed rule published April 2022
- Final Rule published on October 13, 2022
- Effective date is December 12, 2022, which requires quick compliance for accurate projections of tax credits for those impacted by the family glitch for the 2023 plan year.
- Determining what type of coverage is best for an employer, the employee, and their dependents will be complicated. Consumers will need the assistance of a licensed agent or broker to help them determine which coverage is best for them.



Other Resources from Biden Administration:

- Revise the Exchange application on HealthCare.gov in advance of Open Enrollment for the 2023 plan year to include new questions about employer-sponsored coverage for family members
- Revise the list of information consumers need to gather from an employer about the coverage being offered
- Provide resources and technical assistance to State Exchanges that will need to make similar changes on their websites and Exchange application experiences
- Provide training on the new rules to agents, brokers, and others who assist applicants so applicants will better understand their options before enrolling, including the trade-offs if applicants are considering splitting their family between exchange-based and employer-sponsored coverage
- Consider direct outreach to specific consumers who previously applied for subsidized coverage, were denied, but might benefit from the new rules

Example 1

Carol is married to Mike, and they file a joint tax return. Carol does not have access to employer-sponsored coverage, but Mike does. Mike's employer offers them coverage as a couple that is unaffordable based on their household income. However, the coverage would be affordable for Mike if she joined the plan as a single individual.

Who Has Affordable Coverage? *Mike* has an offer of affordable employer coverage.

Who Qualifies for Subsidized Individual Coverage? *Carol* qualifies for subsidized coverage because she does not have an affordable offer from either her or Mike's employer

Does the Employer Have Penalty Liability? Mike's employer does not. If *Carol's* employer is an ALE, then they are at risk of receiving a penalty for not offering her affordable employee-only coverage.

Example 2

The facts of Scenario 1 remain the same, except that Carol gets a job at a company that offers her affordable coverage based on the single premium rate.

Who Has Affordable Coverage? *Mike* and *Carol* now both have affordable employer offers of employee-only coverage.

Who Qualifies for Subsidized Individual Coverage? Nobody

Does the Employer Have Penalty Liability? No

Example 3

The facts of Scenario 2 remain the same; however, Carol and Mike now have six children. The cost to insure their whole family together under either employer plan would be unaffordable based on their family income.

Who Has Affordable Coverage? *Carol* and *Mike* both have affordable employer offers of employee-only coverage.

Who Qualifies for Subsidized Individual Coverage? Their *six children* qualify for subsidized coverage because they do not have affordable employer-sponsored coverage.

Does the Employer Have Penalty Liability? No

Example 4

The facts of Scenario 3 remain the same, but Mike's company instead offers affordable family-level coverage.

Who Has Affordable Coverage? *The whole family* now has access to affordable coverage through Mike's employer. *Carol* continues to also have an offer of affordable employee-only coverage through her own employer.

Who Qualifies for Subsidized Individual Coverage? Nobody

Does the Employer Have Penalty Liability? No

Example 5

The facts of Scenario 4 remain the same, except Carol and Mike no longer claim their oldest child, Greg, as their tax dependent because he is now 23 and working. The cost of employer coverage through Carol's work remains unaffordable to anyone in the family except for her. The cost to insure Mike and the five younger children on Mike's employer-sponsored plan is affordable. When they add in the cost of insuring Greg, though, the coverage becomes unaffordable.

Who Has Affordable Coverage? *Mike* and *the five younger children* continue to have access to affordable coverage through Mike's work. *Carol* continues to also have an offer of affordable employee-only coverage through her own employer. The fact that adding Greg to Mike's coverage would make it unaffordable for the whole family is not a consideration, as Greg is not a tax dependent.

Who Qualifies for Subsidized Individual Coverage? *Greg* may be eligible for subsidized coverage if he chooses not to enroll in Mike's coverage. If he has an offer of affordable single coverage through his own employer, then he will not qualify for subsidized coverage.

Does the Employer Have Penalty Liability? Mike and Carol's employers do not. If *Greg's* employer is an ALE, then they are at risk of receiving a penalty for not offering him affordable coverage.

Employer Reporting

- ***H.R. 7774, Commonsense Reporting Act of 2022***
  - Reps. Mike Thompson (D-CA) and Adrian Smith (R-NE)
- ***S. 3673, Commonsense Reporting Act of 2022***
  - Sens. Mark Warner (D-VA) and Rob Portman (R-OH)

- Establish a new voluntary reporting system, reduce the number of individuals and amount of information that would need to be reported, and eliminate the requirement to collect dependent social security numbers.
- Implement a suspension of enforcement during the months of the pandemic for employer-reporting provisions such as responding to 226-J letters, calculating affordability requirements for 1095 forms, and calculating ALE status with variable-hour employees.

Slides and recording are available
www.nahu.org

Questions?