PART V: SMALL BUSINESS PROVISIONS

Employer Income Tax Credit for Health Insurance

137. Which employers are eligible for the tax credit for the purchase of health insurance available in 2010 and thereafter?

The new health insurance tax credit[[1]](#footnote-1) is designed to help small for-profit businesses and tax-exempt organizations (estimated to be four million in number) that primarily employ low- and moderate-income workers.[[2]](#footnote-2) This credit is available to employers that:

* Have twenty-four or fewer eligible full-time equivalent (FTE) employees with wages averaging less than $50,000 per employee per year, and
* Pay at least 50 percent of health insurance costs[[3]](#footnote-3)

Eligible employees do not include seasonal workers who work for an employer 120 days a year or less,[[4]](#footnote-4) owners, and owners’ family members with average annual compensation of less than $50,000. Such employees are also not eligible if the business pays 50 percent or more of employee-only (single person) health insurance costs. Thus, compensation for seasonal workers, specified owners, and their family members and dependents is not counted in determining average compensation, nor is the health insurance cost for these people eligible for the health insurance tax credit.[[5]](#footnote-5)

The credit is a general business credit and can be carried back for one year and forward for twenty years.[[6]](#footnote-6) The credit, which can be applied to tax liability under the alternative minimum tax, is as follows: [[7]](#footnote-7)

* 35 percent (25 percent for a tax-exempt employer) in 2010 to 2013, and
* 50 percent (35 percent for a tax-exempt employer) beginning in 2014

A tax-exempt employer can use the credit against payroll taxes.

138. Can more than one employer be treated as a single employer for determining the credit available, the number of employers, and the average compensation?

Yes. All employers treated as a single employer under the controlled group rules or the affiliated service group rules are treated as a single employer for purposes of the tax credit.[[8]](#footnote-8)

139. How is the employer 50 percent payment requirement applied?

In 2010, the employer may qualify if it pays at least 50 percent of the cost of employee-only coverage, regardless of actual coverage elected by an employee. For example, at Company A, where employee-only coverage costs $500 per month and family coverage costs $1,500 per month, the employer pays at least $250 per month (50 percent of employee-only coverage) per covered employee. Even if an employee selected family coverage, Company A would meet the contribution requirement to qualify for the tax credit in 2010.

Beginning in 2011, however, the percentage paid by the employer for each enrolled employee must be a uniform percentage for that coverage level. If the employee receives coverage that is more expensive than single coverage (such as family or self-plus-one coverage), the employer must pay at least 50 percent of the premium for each employee’s coverage in 2011 and thereafter.

Thus, grandfathered health insurance plans that, for instance, provide for 100 percent of family coverage for executives and 100 percent of employee-only coverage for staff will qualify for the tax credit in 2010 but not in 2011 or beyond.[[9]](#footnote-9)

140. Which persons are not counted in determining the number of employees or their average compensation?

Owners are all self‐employed individuals (proprietors, partners, members of LLCs taxed as partnerships), (more than) 2 percent shareholders of an S corporation,[[10]](#footnote-10) (more than) 5 percent or more owners of a small business,[[11]](#footnote-11) and family members[[12]](#footnote-12) and dependents of the self-employer, (more than) 2 percent S corporation shareholders, or (more than) 5 percent or more owners.[[13]](#footnote-13) Leased employees are eligible employees for the credit.[[14]](#footnote-14)

Leased employees are considered eligible employees for purposes of the credit.[[15]](#footnote-15)

141. How much is the employer tax credit for employer purchase of health insurance?

The new tax credit applies to for-profit and nonprofit employers meeting certain requirements. From 2010 through 2013, the amount of the credit for for-profit employers is 35 percent, and 25 percent for non-profit employers, of qualifying health insurance costs. The credit is increased for any two consecutive years beginning in 2014 to 50 percent of a for-profit employer’s qualifying expenses and 35 percent for nonprofit employers.[[16]](#footnote-16)

142. How is the employer tax credit calculated?

The credit is largest if there are ten or fewer employees and their average wages do not exceed $25,000.[[17]](#footnote-17) The amount of the credit is phased out for businesses with more than ten eligible employees and average compensation of more than $25,000 (but less than $50,000). The amount of an employer’s premium payments that counts for purposes of the credit is capped by the average premium for the small group market in the employer’s geographic location, as determined by HHS.[[18]](#footnote-18)

The IRS released state rates for 2010.[[19]](#footnote-19)

For nonprofit employers, the credit is taken against the employer's income tax and Medicare withholding obligations and the employer's Medicare payment obligation, but not against Social Security taxes.[[20]](#footnote-20)

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| **Tax Credit Calculations – 2010 and 2014** |
| ***Example*: *For-Profit Employer* *with Ten Employees***  |
| Number of Employees: | 10 |
| Wages: | $250,000 total, or $25,000 per worker |
| Employee Health Care Costs: | $70,000 |
| 2010 Tax Credit: | 35% X $70,000 = $24,500 |
| 2014 Tax Credit: | 50% X $70,000 = $35,000 |
| ***Example: For-Profit Employer with Forty Part-Time Employees***  |
| Number of Employees: | 40 half-time employees (the equivalent of 20 full-time workers) |
| Wages: | $500,000 total, or $25,000 per full-time equivalent worker |
| Employee Health Care Costs: | $240,000 |
| 2010 Tax Credit:  | $28,000 (35% credit with phase-out) |
| 2014 Tax Credit: | $40,000 (50% credit with phase-out) |
| ***Example: Nonprofit Employer with Nine Employees***  |
| Employees: | 9 |
| Wages: | $198,000 total, or $22,000 per worker |
| Employee Health Care Costs: | $72,000 |
| 2010 Tax Credit: | 25% X $72000 = $18,000 |
| 2014 Tax Credit: | 35% X $72,000 = $25,200[[21]](#footnote-21) |

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| **Tax Credit Calculations – 2011** |
| ***Example: For-Profit Employer with Nine Employees*** |
| Employees: | 9 |
| Wages: | $216,000 total, or $24,000 per worker |
| Employee Health Care Costs: | $75,000 |
| 2011 Tax Credit: | 35% X $75000 = $26,250 |

143. How is the average annual wage calculated?

Average annual wages are calculated by dividing the aggregate amount of wages paid by the employer by the number of full‐time‐equivalent (FTE) employees, for the taxable year.[[22]](#footnote-22) Full‐time employees would be calculated by dividing the total hours worked by all employees during the tax year by 2,080 (with a maximum of 2,080 hours for any one employee). Seasonal workers are disregarded.[[23]](#footnote-23) Average annual wages would be determined by dividing the aggregate amount of wages paid by the employer by the number of FTE employees, for the taxable year.[[24]](#footnote-24)

The average wage threshold for determining the phase‐out of credits will be adjusted for inflation after 2013.

144. How does the employer health insurance tax credit change in 2014?

In 2014, the amount of the credit increases to 50 percent (35 percent in the case of a tax-exempt eligible small employer) of the lesser of:

* The aggregate amount of employer contributions for premiums for qualified health plans offered by the employer (nonelective contributions excluding employee compensation deferrals) to its employees through an exchange, or
* The average employer contributions (nonelective contributions excluding employee compensation deferrals) which the employer would have made to a qualified health plan for the small group market in the rating area in which the employee enrolls for coverage.[[25]](#footnote-25)

Firms can claim the credit for 2010 through 2013 and for any two consecutive years after that.[[26]](#footnote-26) [This includes regulations to prevent avoiding the 2-year limit on the credit period through the use of successor or multiple entities.][[27]](#footnote-27)

The self‐employed are eligible for individual premium assistance (the individual tax credit) for health insurance purchased through an exchange available in 2014 if they meet the income requirements (less than 400 percent of the federal poverty level).

To continue receiving a tax credit in 2014, a small employer must drop its existing coverage and purchase group coverage in the newly created exchanges.[[28]](#footnote-28)

The average annual wage thresholds are indexed for inflation.[[29]](#footnote-29)

Simple Cafeteria Plan

145. How do existing cafeteria plans work?

In general, employer and employee contributions to any cafeteria plan are deductible to the employer, not subject to Social Security tax, and not taxable income to the participant. Thus, available benefits, which can be purchased with "pre-tax dollars," include:

* health and dental insurance
* accidental death and dismemberment policies
* reimbursement for health and dental expenses not covered by insurance
* dependent care
* adoption assistance[[30]](#footnote-30)
* group term life insurance
* Health Savings Accounts
* 401(k) deferrals
* adoption assistance, and
* disability insurance

Benefits not available through cafeteria plans are:

* Archer Medical Savings Accounts (MSAs)
* scholarships
* educational assistance
* Section 132 fringe benefits[[31]](#footnote-31)
* long-term care insurance and LTC services,[[32]](#footnote-32) (though may be paid from an HSA funded through a cafeteria plan)
* health insurance purchased on an exchange that is not purchased pursuant to an employer’s exchange-purchased group health insurance plan[[33]](#footnote-33)
* group term insurance for a spouse or dependent, and
* 403(b) elective deferrals

A plan offering any nonqualified benefit is not a cafeteria plan.[[34]](#footnote-34) If a cafeteria plan fails to operate in compliance with Code section 125 or fails to satisfy any of the written plan requirements for health FSAs, the plan is not considered a Code section 125 cafeteria plan, and employees’ election of nontaxable benefits results in gross income to all employees.[[35]](#footnote-35)

146. What is the new simple cafeteria plan that is available in 2011?

The 2010 health reform law included a provision creating “simple cafeteria plans” for small (average employment of 100 or fewer employees in either of the two preceding years) businesses, effective for years beginning in 2011.[[36]](#footnote-36) The concept is similar to 401(k) retirement plan safe harbors, SIMPLE 401(k)s, and SIMPLE-IRAs, whereby most nondiscrimination requirements can be met by plan design and the use of either nonelective employer contributions for all eligible employees or employer-matching contributions for participating employees making salary reduction contributions.

Simple cafeteria plans will be of interest to eligible employers that might otherwise have difficulty passing one or more of the applicable income tax nondiscrimination tests. For example, small employers may have difficulty passing the 25 percent key employee concentration test[[37]](#footnote-37) for cafeteria plans or the 55 percent average benefits test for dependent care.[[38]](#footnote-38) In the past, these employers might have decided not to sponsor a cafeteria plan or designed their plans to exclude highly compensated employees (HCEs).

147. Are simple cafeteria plans subject to any of the regular cafeteria plan tax rules?

Yes. A simple cafeteria plan is a cafeteria plan adopted by an eligible employer that meets specified contribution, eligibility, and participation requirements.[[39]](#footnote-39) Except for the special rules that apply to the simple cafeteria plan, the plan also must meet the other cafeteria plan rules.[[40]](#footnote-40) Thus, it must be a written plan[[41]](#footnote-41) administered in accordance with the written plan terms. The cafeteria plan must, among other things:

* Be maintained by an employer for employees, and
* Operate in compliance with the Code and regulation requirements as well as the requirements of other applicable laws

In part, the written plan requirements include the following:

* Describe all benefits
* Provide rules for eligibility to participate
* Indicate how employer and employer contributions are made under the plan
* State the maximum amount of employer and employee elective contributions
* Describe the procedure for making elections
* Provide that all elections are irrevocable (except to the extent that the plan includes the “change in status” rules)
* List additional requirements if one of the offerings is a health, dependent care, or adoption assistance FSA
* State the plan year
* Provide rules for substantiation of expenses
* If the plan provides a grace period, it must include required language applicable to the two-and-a-half-month grace period
* Describe the regulations’ “use it or lose it” rule.

An employer maintaining a cafeteria plan in which any highly compensated employee participates must make sure that both the cafeteria plan and each qualified benefit satisfies the cafeteria plan and benefit-specific nondiscrimination requirements. A failure to satisfy the nondiscrimination rules results in additional taxable income to all employees.

148. What is the benefit of the simple cafeteria plan?

Simple cafeteria plans automatically meet all “applicable nondiscrimination requirements,”[[42]](#footnote-42) which are the nondiscrimination requirements of Code section 125(b) (the 25 percent concentration test) and the nondiscrimination requirements of Code sections 79(d), 105(h), and 129(d) applicable to group term life insurance, self-insured health benefits (medical expense reimbursement), and dependent care assistance benefits (child care), respectively.

Through an apparent oversight, Code section 125(j) does not provide an express exception for the health law reform’s health insurance nondiscrimination rules of new Code section 9815. However, it is likely that if the same insurance options are available to all participants, regardless of their use, the health insurance nondiscrimination rules will be met.[[43]](#footnote-43) The health insurance nondiscrimination regulations, when they are issued, will provide the definitive answer.

Certain benefit-specific nondiscrimination rules continue to apply, such as those for adoption assistance plans because Code section 137 is not listed in the exemption from the nondiscrimination rules.

149. What are the special rules for premium conversion plans?

A premium conversion cafeteria plan (POP) -- but not a health FSA -- is one that offers an election between cash and payment of the employee share of the premium for employer-provided health insurance. Health insurance premium conversion cafeteria plans meet the regular cafeteria plan eligibility nondiscrimination rules if they meet a safe harbor test[[44]](#footnote-44) and pass a safe harbor/unsafe harbor facts-and-circumstances test.[[45]](#footnote-45) Examples of situations that meet or fail this test include the following:[[46]](#footnote-46)

*Example (1)*. Same qualified benefit for same salary reduction amount. Employer A has one employer-provided accident and health insurance plan. The cost to participants electing the accident and health plan is $10,000 per year for single coverage. All employees have the same opportunity to purchase the plan and reduce their salaries by $10,000. The cafeteria plan satisfies the eligibility test.

*Example (2)*. Same qualified benefit for unequal salary reduction amounts. Same facts as Example 1 except the cafeteria plan offers nonhighly compensated employees (NHCEs) the election to reduce their salaries by $10,000 to pay premiums for single coverage. The cafeteria plan provides an $8,000 employer flex-credit to highly compensated employees (HCEs) to pay a portion of the premium, and it provides an election to reduce their salaries by $2,000 to pay the balance of the premium. The cafeteria plan fails the eligibility test because the employer contribution – the flex credit – is given solely to HCEs.

*Example (3)*. Accident and health plans of unequal value. Employer B's cafeteria plan offers two employer-provided accident and health insurance plans: Plan X, available only to HCEs, is a low-deductible plan. Plan Y, available only to NHCEs, is a high-deductible plan (as defined in Code section 223(c)(2)). The annual premium for single coverage under Plan X is $15,000 per year, and it is $8,000 per year for Plan Y. Employer B's cafeteria plan provides that HCEs may elect salary reduction of $15,000 for coverage under Plan X, and that NHCEs may elect salary reduction of $8,000 for coverage under Plan Y. The cafeteria plan fails the eligibility test.

*Example (4)*. Accident and health plans of unequal value for unequal salary reduction amounts. Same facts as Example 3, except that the amount of salary reduction for HCEs to elect Plan X is $8,000. The cafeteria plan also fails the eligibility test.

150. Can business owners participate in a simple cafeteria plan?

When a business wants to avoid the 25 percent concentration test and contribute for owner-employees, it is likely that only a regular C corporation can do so because only these shareholder-employees are “employees” for income tax purposes. Sole proprietors, more-than-2-percent S corporation shareholders, and partners (including members of LLCs taxed as partnerships) are not employees for income tax purposes. Rather, they are "self-employed" individuals.

151. Which employers can sponsor a simple cafeteria plan?

In order to establish and maintain a simple cafeteria plan, an employer must qualify as an eligible employer. An “eligible employer” is one that employed an average of 100 or fewer employees on business days during either of the two preceding years. For this purpose, a year may only be taken into account if the employer was in existence throughout that year.[[47]](#footnote-47) The Code's simple cafeteria plan provisions do not define the term “year” for the eligible employer definition. Pending IRS guidance, it seems reasonable to use the plan year selected by the employer as the plan’s measuring period. If an employer was not in existence throughout the preceding year, the eligible employer determination is based on the average number of employees that it is reasonably expected such employer will employ on business days in the current year.[[48]](#footnote-48)

If an eligible employer’s workforce continues to grow, it can remain eligible in subsequent years until the employer employs an average of 200 or more employees on business days during any year preceding any such subsequent year.[[49]](#footnote-49)

If an employer has 100 or fewer employees in the current year but more than 100 employees in either of the two preceding years, the employer cannot adopt a simple cafeteria plan for the current year but will be able to do so in the succeeding year. Leased employees within the meaning of Code sections 414(n) and (o) are counted as employees.[[50]](#footnote-50) However, the Code is silent as to whether an employer can disregard (or count on a full-time equivalent basis) part-time, temporary, or seasonal employees when determining whether it is an eligible employer. Pending guidance, the conservative approach is to count all employees when making an eligible employer determination.

There is no lower limit on the size of the employer. Additionally, an employer whose only employees are prohibited group members (key employees or HCEs), or with only one owner-employee, could qualify as an eligible employer. However, the prohibition against sole proprietors, partners, and more-than-2 percent shareholders in a Subchapter S Corporation participating in a cafeteria plan applies, so, in general, only owner (shareholder)-employees of C corporations can participate in a simple cafeteria plan. Moreover, it is not clear whether such an employer could meet the required employer contributions test discussed below in Q 157.

152. What happens when an employer with a simple cafeteria plan ceases to qualify to sponsor such a plan?

Employers with simple cafeteria plans will cease to qualify as eligible employers as their workforces expand beyond 200 employees. Thus, employers that maintain simple cafeteria plans must monitor their status as eligible employers. If an employer ceases to be an eligible employer, the regular concentration and nondiscrimination tests will apply. Employers that cease to qualify as eligible employers will need to determine whether to amend or discontinue their cafeteria plan.

153. What aggregation rules apply in defining an employer?

The employer aggregation rules under Code section 52 and Code section 414 (controlled and affiliated service groups) generally apply for purposes of determining an eligible employer.[[51]](#footnote-51) Additionally, an employer includes a “predecessor employer,” but the term is undefined. [[52]](#footnote-52)

154. Who are “qualified employees” that must be eligible to participate in a simple cafeteria plan?

 For purposes of a simple cafeteria plan, “qualified employees” are all non-excludable employees who had at least 1,000 hours of service during the preceding plan year, except a highly compensated employee under Code section 414(q)[[53]](#footnote-53) or key employee under Code section 416(i) and who is eligible to participate in the plan.[[54]](#footnote-54)

This definition of qualified employee is relevant only to the two alternative minimum contribution requirements, discussed below in Q 157, and to highly compensated employees (HCEs) and key employees. HCEs and key employees may participate like everyone else so long as they are “employees” and do not receive disproportionate employer nonelective or matching contributions. Comparable contributions must be made for all eligible employees.

Code section 414(q) defines an HCE as an employee who:

* was a more-than-5 percent owner of the employer at any time during the current or preceding plan year, or
* for the preceding plan year, had compensation in excess of a specified dollar threshold ($115,000 for 2012)

If elected by the employer, an HCE may also be an employee in the “top-paid group” (generally constituting the top 20 percent ranked by compensation) of employees.

Code section 416 defines a key employee as an employee who, during the plan year, was:

* an officer of the employer with annual compensation in excess of a specified dollar threshold ($160,000 for 2010)
* a more-than-5-percent owner of the employer, or
* a more-than-1-percent owner of the employer with annual compensation in excess of $150,000

155. Which employees are excludable employees?

Excludable employees (employees who need not be allowed to participate) are those who:

* have not attained age 21 (or a younger age provided in the plan) before the end of the plan year
* have less than 1000 hours of service in the prior plan year
* have less than one year of service as of any day during the plan year
* are covered under a collective bargaining agreement; or
* are nonresident aliens working outside the United States[[55]](#footnote-55)

An employer may have a shorter age and service requirement but only if such shorter service or younger age applies to all employees.[[56]](#footnote-56)

Employees who worked 1,000 hours in a previous plan year but who do not have a year of service in the current plan year can be excluded for the current year.[[57]](#footnote-57) However, since the rule is that they can be excluded if they do not have a year of service on any day in the year, they may have 1,000 hours if they go from full-time to part-time during the current plan year. This is an important point when the employee’s salary is less than the health benefits. Employees should be entitled to the entire maximum benefit if elected, even if greater than their compensation in order to safeguard simple status for the cafeteria plan.

156. What is the benefit nondiscrimination requirement?

Each participating employee must be able to elect any benefit under the plan under the same terms and conditions as all other participants.[[58]](#footnote-58) Again, if the special requirements of a specific benefit apply, such as adoption assistance, they must be met as well.

157. What is the employer minimum contribution requirement?

There are two alternative employer contribution requirements. Employer contributions to a simple cafeteria plan must be sufficient to provide benefits to qualified employees of at least either:

* A uniform percentage of at least 2 percent of compensation (defined as it is under Code Section 414(s) for retirement plan purposes, whether or not the employee makes salary reduction contributions to the plan);[[59]](#footnote-59) or
* The lesser of a 200 percent matching contribution (or more, if specified by the plan) or 6 percent of the employee’s compensation.[[60]](#footnote-60)

Additional contributions can be made, but the rate of any matching contribution for HCEs or key employees cannot be greater than the rate of the match for the qualified employees (the participating employees other than key and highly compensated employees).[[61]](#footnote-61)

The minimum contribution must be available for application toward the cost of any qualified benefit (any permitted benefit other than a taxable benefit) offered under the plan.[[62]](#footnote-62)

158. Does the Matching Contribution Method require a 100 percent or 200 percent employer match?

The 200 percent matching requirement may be only a 100 percent requirement. An argument may be made for counting an employee’s salary reduction contributions when determining whether an employer has contributed “twice the amount of the [employee’s] salary reduction contributions.” Arguably, the law calls for the employer to contribute the employee’s salary reductions (which are employer contributions for tax purposes[[63]](#footnote-63)) plus a 100 percent match, for a total contribution equal to twice the employee’s salary reductions. Another reading is that the employer must contribute twice the amount of the employee’s salary reductions as matching contributions. The 6 percent of compensation limit applies under either interpretation. The report on health reform by the Joint Committee on Taxation supports the 100 percent view and states that the minimum matching contribution is the lesser of 100 percent of the employee’s salary reduction contribution, or 6 percent of the employee’s compensation for the plan year.[[64]](#footnote-64)

Compensation for purposes of the minimum contribution requirement is compensation within the meaning of Code section 414(s).[[65]](#footnote-65)

159. What happens when an employer has all HCEs, all Key Employees and no qualified employees?

An employer whose workforce consists of only one or more HCEs or Key Employees would not have any qualified employees.[[66]](#footnote-66) The Code’s simple cafeteria plan provisions require a contribution for each qualified employee. Thus, if the plan provides for that contribution but there is no qualified employee, it is not clear whether such an employer would be exempt from this requirement (in which case the plan could be funded entirely with salary reductions) or would be disqualified from having a simple cafeteria plan.

No Employer Mandate

160. Is there an employer mandate for small employers?

As discussed in Part VIII, the employer mandate (“play or pay”) tax penalty on employers failing to provide specified health coverage for employees only applies to employers with fifty or more full-time equivalent employees. Thus, small employers have no tax penalty for not offering health insurance. Instead, certain small employers who would otherwise be eligible for the tax credit for health insurance will not obtain that benefit if they provide no health insurance or if they provide health insurance that does not meet the requirements to obtain the tax credit.

Automatic Enrollment Exclusion

161. Which employers are not required to provide automatic enrollment into their health plans?

Employers with 200 or fewer full-time employees are exempt from the automatic enrollment requirement. Section 18A of the Fair Labor Standards Act (FLSA),[[67]](#footnote-67) directs an employer with more than 200 full-time employees to which the FLSA applies to automatically enroll new full-time employees in one of the employer’s health benefits plans (subject to any waiting period authorized by law), and to continue the enrollment of current employees in a health benefits plan offered through the employer. FLSA section 18A further requires adequate notice and the opportunity for an employee to opt out of any coverage in which the employee was automatically enrolled.[[68]](#footnote-68)

On December 22, 2010, the Treasury, Labor, and HHS departments issued frequently asked questions (FAQs) on FLSA section 18A, which noted that the statute provides that employer compliance with the automatic enrollment provisions of section 18A are to be carried out “[i]n accordance with regulations promulgated by the Secretary [of Labor].” That FAQ also stated that it is the view of the Department of Labor that, until such regulations are issued, employers are not required to comply with section 18A. Finally, the FAQ indicated that the Department of Labor intends to complete this rulemaking by 2014.[[69]](#footnote-69)

W-2 Reporting Exemption

162. Which employers are exempt from the W-2 reporting requirement?

Employers filing fewer than 250 Forms W-2 for the preceding calendar year are exempt from the W-2 reporting requirement until further notice. Otherwise, employers must comply with the W-2 requirements for the W-2 forms issued for the 2012 calendar year.[[70]](#footnote-70)

Employers that provide "applicable employer-sponsored coverage" under a group health plan are subject to a W-2 reporting requirement. This includes businesses, tax-exempt organizations, and federal, state, and local government entities (except with respect to plans maintained primarily for members of the military and their families).

The health reform law requires the value of the health care coverage to be reported in Box 12 of Form W-2, with Code DD to identify the amount. There is no reporting on the Form W-3 of the total of these amounts for all the employer’s employees. In general, the amount reported should include both the portion paid by the employer and the portion paid by the employee.

1. . IRC Sec. 45R. [↑](#footnote-ref-1)
2. . http://www.irs.gov/newsroom/article/0,,id=223666,00.html (last accessed May 25, 2011). [↑](#footnote-ref-2)
3. . IRC Sec. 45R(d)(2). [↑](#footnote-ref-3)
4. . IRC Sec. 45R(d)(5). [↑](#footnote-ref-4)
5. . http://www.irs.gov/newsroom/article/0,,id=220839,00.html (last accessed May 25, 2011). [↑](#footnote-ref-5)
6. . IRC Sec. 38(b) & 39(A). [↑](#footnote-ref-6)
7. . IRC Sec. 38(c)(4)(B)(vi). [↑](#footnote-ref-7)
8. . IRC Sec. 45R(e)(5), incorporating the controlled group rules of IRC Sec. 414(b) and (c), the affiliated service group rules of IRC Sec. 414(m), and the anti-abuse rules of IRC Sec. 414(o). [↑](#footnote-ref-8)
9. . *See* http://www.irs.gov/newsroom/article/0,,id=220839,00.html (last accessed May 25, 2011). See also, Part VI for more information on grandfathered health plans. [↑](#footnote-ref-9)
10. . IRC Sec. 1372(b). [↑](#footnote-ref-10)
11. . Defined by IRC Sec. 416(i)(1)(B)(i), which contains the top-heavy retirement plan rules. [↑](#footnote-ref-11)
12. . Any individual who bears any of the relationships described in IRC Sec. 152(d)(2)(A) through (G). [↑](#footnote-ref-12)
13. . IRC Sec. 152(d)(2)(H). [↑](#footnote-ref-13)
14. . IRC Sec. 45R(e). [↑](#footnote-ref-14)
15. . IRC Sec. 45R(e). [↑](#footnote-ref-15)
16. . See http://www.ncsl.org/documents/health/SBtaxCredits.pdf (last accessed February 27, 2012). See Q 142 for sample calculations. [↑](#footnote-ref-16)
17. . IRC Sec. 45R(c). [↑](#footnote-ref-17)
18. . http://www.irs.gov/newsroom/article/0,,id=220839,00.html (last accessed May 25, 2011). [↑](#footnote-ref-18)
19. . Rev. Rul. 2010-13. [↑](#footnote-ref-19)
20. . IRC Sec. 45R(f)(1)(B). [↑](#footnote-ref-20)
21. . For additional guidance, see IRS Notices 2010-44 and 2010-82. [↑](#footnote-ref-21)
22. . IRC Sec. 45R(c) and (d). [↑](#footnote-ref-22)
23. . IRC Sec. 45R(d)(5). [↑](#footnote-ref-23)
24. . IRC Sec. 45R(c) and (d). [↑](#footnote-ref-24)
25. . IRC Sec. 45R(e). [↑](#footnote-ref-25)
26. . IRC Sec. 45R(e)(2). [↑](#footnote-ref-26)
27. . IRC Sec. 45R(i). [↑](#footnote-ref-27)
28. . IRC Sec. 45R(e)(2). [↑](#footnote-ref-28)
29. . IRC Sec. 45R(d)(3). [↑](#footnote-ref-29)
30. . See Notice 97–9 Sec. II; Reg. §601.601(d)(2)(ii)(b); 2007 Prop. Reg. §1.125-5(h) (adding adoption assistance as a permissible FSA benefit to health and dependent care FSAs. [↑](#footnote-ref-30)
31. . IRC Sec. 125(f)(1). [↑](#footnote-ref-31)
32. . IRC Sec. 125(f)(2). [↑](#footnote-ref-32)
33. . IRC Sec. 125(f)(3). [↑](#footnote-ref-33)
34. . IRC Sec. 125(d)(1)(B); Prop. Treas. Reg. §1.125-1(q). [↑](#footnote-ref-34)
35. . Prop. Treas. Reg. §1.125-1(c)(1), (c)(6) and (c)(7). However, benefits that fail discrimination tests under the various IRC sections do not fail to be qualified benefits. Rather, the discriminatory amounts are included in gross income, not the entire amount of the benefit(s). [↑](#footnote-ref-35)
36. . See IRC Sec. 125(j). [↑](#footnote-ref-36)
37. . IRC Sec. 125(b). [↑](#footnote-ref-37)
38. . IRC Sec. 129(d). [↑](#footnote-ref-38)
39. . IRC Sec. 125(j)(2). [↑](#footnote-ref-39)
40. . IRC Sec. 125(j)(2), stating that a “simple cafeteria plan” means a **cafeteria plan** . . . . [Emphasis added.] [↑](#footnote-ref-40)
41. . IRC Sec. 125(d)(1). [↑](#footnote-ref-41)
42. . IRC Sec. 125(j)(6). [↑](#footnote-ref-42)
43. . Kevin Knopf, Attorney-Advisor, Office of Tax Policy of the Treasury Department, ECFC Annual Symposium (Aug. 6, 2010) stated that the safe harbor for simple cafeteria plans does extend to the nondiscrimination requirements of IRC Sec. 9815 that apply to employer-provided health insurance plans. [↑](#footnote-ref-43)
44. . Prop. Reg. §1.125-7. [↑](#footnote-ref-44)
45. . Prop. Reg. §1.125-7(b)(3). [↑](#footnote-ref-45)
46. . Prop. Reg. §1.125-7(b)(3)(iv). [↑](#footnote-ref-46)
47. . IRC Secs. 125(j)(5)(A) and (B). [↑](#footnote-ref-47)
48. . IRC Sec. 125(j)(5)(B). [↑](#footnote-ref-48)
49. . IRC Sec. 125(j)(5)(C)(ii). [↑](#footnote-ref-49)
50. . IRC Sec. 125(j)(5)(D)(ii). [↑](#footnote-ref-50)
51. . IRC Sec. 125(j)(5)(D)(ii). [↑](#footnote-ref-51)
52. . IRC Sec. 125(j)(5)(D)(i). [↑](#footnote-ref-52)
53. . IRC Sec. 125(j)(3)(D)(iii). [↑](#footnote-ref-53)
54. . IRC Sec. 125(j)(3)(D)(iv). [↑](#footnote-ref-54)
55. . IRC Sec. 125(j)(4)(B). [↑](#footnote-ref-55)
56. . IRC Sec. 125(j)(4)(B)(iv). [↑](#footnote-ref-56)
57. . IRC Sec. 125(j)(4)(B)(ii). [↑](#footnote-ref-57)
58. . IRC Sec. 125(j)(4)(A)(ii). [↑](#footnote-ref-58)
59. . IRC Sec. 125(j)(3)(A)(i). [↑](#footnote-ref-59)
60. . IRC Sec. 125(j)(3)(A)(ii). [↑](#footnote-ref-60)
61. . IRC Sec. 125(j)(3)(B). [↑](#footnote-ref-61)
62. . IRC Sec. 125(j)(3)(A). [↑](#footnote-ref-62)
63. . Prop. Treas. Reg. §1.125-1(r). [↑](#footnote-ref-63)
64. . Technical Explanation of the Revenue Provisions of the “Reconciliation Act of 2010,” as amended, in Combination With the “Patient Protection and Affordable Care Act,” p. 119 (JCX-18-10) (Mar. 21, 2010) at https://www.jct.gov/publications.html?func=startdown&id=3673. Kevin Knopf, Attorney-Advisor, Office of Tax Policy of the Treasury Department, ECFC Annual Conference (Mar. 4, 2011), has also unofficially expressed this view. [↑](#footnote-ref-64)
65. . IRC Sec. 125(j)(7). [↑](#footnote-ref-65)
66. . See Q 126 for definition of qualified employees. [↑](#footnote-ref-66)
67. . Added by PPACA §1511. [↑](#footnote-ref-67)
68. . IRS Technical Release No. 2012-01. [↑](#footnote-ref-68)
69. . See www.dol.gov/ebsa/faqs/faq-aca5.html. [↑](#footnote-ref-69)
70. . IRS Notice 2012-9, Q&A-3. [↑](#footnote-ref-70)