

# COMPLIANCE OVERVIEW FOR SMALL GROUPS

Provided by Clarke & Company Benefits, LLC

## Employee Benefits Compliance Checklist for Small Employers

Federal law imposes numerous requirements on the group health coverage that employers provide to their employees. Many federal compliance laws apply to all group health plans, regardless of the size of the sponsoring employer. However, there are some compliance exceptions for group health coverage provided by small employers. For this purpose, a small employer is one with **fewer than 50 employees**.

Small employers, for example, are not required to comply with the Affordable Care Act's (ACA) employer shared responsibility rules for applicable large employers (ALEs), the ACA's Form W-2 reporting rules or the Family and Medical Leave Act's (FMLA) requirements.

This Compliance Overview provides a checklist for employee benefit laws applicable to small employers, and also indicates when a requirement does not apply to a small employer's health coverage.

### LINKS AND RESOURCES

- Model COBRA notices are available on the DOL's [web page](#) for COBRA compliance
- [Creditable coverage disclosure notices](#) under Medicare Part D are available through CMS
- [Model CHIPRA notice](#)
- [Proposed rule](#) on Form 5500 reporting

This Compliance Overview is not intended to be exhaustive nor should any discussion or opinions be construed as legal advice. Readers should contact legal counsel for legal advice.

### HIGHLIGHTS

#### APPLICABLE REQUIREMENTS

- The ACA's market reforms (such as the essential health benefits package for small group plans)
- COBRA continuation coverage
- HIPAA portability rules
- Medicare Part D creditable coverage disclosures

#### NON-APPLICABLE REQUIREMENTS

- Form 5500 filing requirement (if the plan is insured and/or unfunded)
- The ACA's employer shared responsibility rules for ALEs
- Section 6056 reporting for ALEs
- FMLA



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## AFFORDABLE CARE ACT (ACA)

### □ Health Coverage Changes

The ACA’s market reforms apply to health plans and health insurance issuers, with narrow exceptions for certain types of plans (for example, retiree medical plans). **There is not an overall exception for small employers.** The following checklist provides a high-level overview of key ACA market reforms:

- ✓ Must provide **comprehensive health coverage** consisting of the essential health benefits (EHB) package—Applies to all non-grandfathered insured health plans in the small group market. Most states define the small group market as including employers with **50 or fewer employees**.

Effective for plan years beginning on or after Jan. 1, 2016, the ACA was set to expand the small group market to include employers with up to 100 employees. However, on Oct. 7, 2015, the [Protecting Affordable Coverage for Employees \(PACE\) Act](#) repealed the ACA’s small group market expansion requirement. As a result, states now have the option, but are not required, to expand their small group markets to include businesses with up to 100 employees.

- ✓ **No annual or lifetime dollar limits on EHB**—Applies to all health plans.
- ✓ **Out-of-pocket maximums** on EHB cannot exceed certain limits—Applies to all non-grandfathered health plans.

Out-of-pocket Maximum Limits		
Plan Year	Family Coverage	Self-only Coverage
<b>2017</b>	\$14,300	\$7,150
<b>2018</b>	\$14,700	\$7,350

- ✓ Cannot impose a **waiting period that exceeds 90 days**—Applies to all health plans.
- ✓ No **pre-existing condition exclusions** on any covered individuals—Applies to all health plans.
- ✓ Cannot discriminate against plan participants who participate in **clinical trials**—Applies to all non-grandfathered health plans.
- ✓ Must cover specific **preventive care services without imposing cost-sharing requirements**—Applies to all non-grandfathered health plans.
- ✓ Health plans that provide dependent coverage for children must make coverage available for **adult children up to age 26**—Applies to all health plans.

- ✓ Cannot **rescind coverage** for covered individuals, except in cases of fraud or intentional misrepresentation of material fact—Applies to all health plans.

The ACA created several notice and disclosure obligations for group health plans, such as:

- **Statement of Grandfathered Status**—Plan administrator or issuer of a grandfathered plan must provide this statement on a periodic basis with participant materials describing plan benefits, such as the summary plan description (SPD) and open enrollment materials.
- **Notice of Rescission**—Plan administrator or issuer must provide a notice of rescission to affected participants at least 30 days before the rescission occurs.
- **Notice of Patient Protections and Selection of Providers**—Plan administrator or issuer of a non-grandfathered plan must provide a notice of patient protections/selection of providers whenever the SPD or similar description of benefits is provided to a participant. These provisions relate to the choice of a health care professional and benefits for emergency services.
- **Uniform Summary of Benefits and Coverage (SBC)**—Plan administrator or issuer must provide the uniform SBC to participants and beneficiaries at certain times (including upon application for coverage and at renewal), as well as provide a 60-day advance notice of material changes to the summary that take place mid-plan year.
- **Exchange Notice**—Employers must provide new hires a written notice about the ACA Exchanges.

### □ **W-2 Reporting**

The Form W-2 reporting obligation applies to employers sponsoring group health plans. **Small employers (those that file fewer than 250 W-2 Forms) are exempt until further guidance is provided.** Other employers were required to comply with this reporting beginning with the 2012 tax year.

Employers must disclose the aggregate cost of employer-sponsored coverage provided to employees on the employees' W-2 Forms. This reporting is intended to provide information to employees on how much their health coverage costs. It does not mean that the cost of coverage is taxable to employees.

### □ **Employer Penalty Rules**

Under the ACA's employer penalty rules, applicable large employers (ALEs) that do not offer affordable, minimum value health coverage to their full-time employees (and dependent children) will be subject to penalties if any full-time employee receives a subsidy for health coverage through an Exchange. These employer penalties are also known as the "employer shared responsibility" or "pay or play" rules.

**Key Point:** "Pay or play" penalties do not apply to employers that do not qualify as ALEs, regardless of whether they offer coverage to some, all or none of their employees. Also, Section 6056 reporting does not apply to employers that are not ALEs.

To qualify as an ALE, an employer must employ, on average, **at least 50 full-time employees**, including full-time equivalent employees (FTEs), on business days during the preceding calendar year. All employers

that employ at least 50 full-time and FTE employees are subject to these rules, including for-profit, nonprofit and government employers.

## □ **Section 6055 and 6056 Reporting**

The ACA requires ALEs to report information to the Internal Revenue Service (IRS) and to full-time employees regarding the employer-sponsored health coverage. The IRS uses the information that ALEs report to verify employer-sponsored coverage and to administer the employer shared responsibility rules. This reporting requirement is found in Internal Revenue Code (Code) Section 6056.

In addition, the ACA requires every health insurance issuer, sponsor of a self-insured health plan, government agency that administers government-sponsored health insurance programs and any other entity that provides minimum essential coverage to file an annual return with the IRS reporting information for each individual who is provided with this coverage. Related statements must also be provided to individuals. This reporting requirement is found in Code Section 6055.

ALEs that sponsor self-insured plans	ALEs that sponsor insured plans	Non-ALEs that sponsor self-insured plans	Non-ALEs that sponsor insured plans
Must report: <ul style="list-style-type: none"> <li>Information under Section 6055 about health coverage provided; and</li> <li>Information under Section 6056 about offers of health coverage.</li> </ul>	Must report information under Section 6056. These employers are not required to report under Section 6055.	Must report information under Section 6055. These employers are not required to report under Section 6056.	These employers are not required to report under either Section 6055 or Section 6056.

## COBRA

COBRA applies to employers that had **20 or more employees** on more than 50 percent of the typical business days during the previous calendar year. COBRA requires employers to provide eligible employees and their dependents who would otherwise lose group health coverage as a result of a qualifying event with an opportunity to continue group health coverage.

COBRA includes a number of notice/disclosure requirements, such as the following:

- **Initial/General COBRA Notice**—Plan administrator must generally provide an explanation of COBRA coverage and rights within 90 days of when group health plan coverage begins.
- **Notice to Plan Administrator**—Employer must notify the plan administrator of certain qualifying events, such as an employee’s termination or reduction in hours, an employee’s death, an employee’s Medicare entitlement and the employer’s bankruptcy. The notice must be provided within 30 days of the qualifying event or the date coverage would be lost as a result of the qualifying event, whichever is later.

- **COBRA Election Notice**—Plan administrator must generally provide the COBRA election notice within 14 days after being notified of the qualifying event (or 44 days after the qualifying event if the employer is the plan administrator).
- **Notice of Unavailability of COBRA**—If an individual is not eligible for COBRA, the plan administrator must generally provide a notice of COBRA unavailability within 14 days after being notified of the qualifying event (or 44 days after the qualifying event, if the employer is the plan administrator).
- **Notice of Early Termination of COBRA**—Plan administrator must provide an early termination notice as soon as practicable following the determination that COBRA coverage will terminate earlier than the end of the maximum coverage period.
- **Notice of Insufficient Payment**—Plan administrator must notify a qualified beneficiary that the COBRA payment was not significantly less than the correct amount before coverage is terminated for nonpayment.
- **Premium Change Notice**—Plan administrator should provide a notice of premium increase at least one month prior to the effective date.

[Model COBRA notices](#) are available from the DOL.

## EMPLOYEE RETIREMENT INCOME SECURITY ACT (ERISA)

### □ **General Requirements**

ERISA applies to employee welfare benefit plans, including group health plans, unless specifically exempted. Church and government plans are exempt. **There is not an exception for small employers.**

ERISA imposes a variety of compliance obligations on group health plan sponsors and administrators. For example, ERISA establishes strict fiduciary duty standards for individuals that operate and manage employee benefit plans and requires that plans create and follow claims and appeals procedures. ERISA requires plan administrators to provide the following notices/disclosures:

- **SPD**—Plan administrator must automatically provide an SPD to participants within 90 days of becoming covered by the plan. An updated SPD must be provided at least every five years if changes have been made to the information contained in the SPD. Otherwise, an updated SPD must be provided at least every 10 years.
- **Summary of Material Modifications (SMM)**—Plan administrator must provide an SMM automatically to participants within 210 days after the end of the plan year in which the change was adopted. If benefits or services are materially reduced, participants generally must be provided with the SMM within 60 days from adoption. Also, plan administrators and issuers must provide 60 days' advance notice of any material modification to plan terms or coverage that takes effect mid-plan year and affects the content of the SBC. The 60-day notice can be provided to participants through an updated SBC or by issuing an SMM.
- **Plan Documents**—Plan administrator must provide copies of plan documents no later than 30 days after a written request.

- **Summary Annual Report (SAR)**—ERISA plan administrators are subject to the SAR requirement, unless an exception applies. Plans that are exempt from the Form 5500 filing requirement are not required to provide the SAR. The SAR is a narrative summary of the Form 5500 and includes a statement of the right to receive a copy of the plan's annual report. The SAR must generally be provided within nine months after the end of the plan year. If the Form 5500 filing deadline was extended, the SAR must be provided within two months after the end of the extension period.

## □ **Form 5500 Requirements**

The Form 5500 requirement applies to plan administrators of ERISA plans, unless an exception applies. **Small health plans (fewer than 100 participants) that are fully insured, unfunded or a combination of fully insured and unfunded, are exempt from the Form 5500 filing requirement.**

The Form 5500 is used to ensure that employee benefit plans are operated and managed according to ERISA's requirements. The filing requirements vary according to the type of ERISA plan. Unless an extension applies, the Form 5500 must be filed by the last day of the seventh month following the end of the plan year (that is, July 31 of the following year for calendar year plans).

A [proposed rule](#) from July 21, 2016, would eliminate the current Form 5500 filing exemption for small group health plans. Under the proposal, all ERISA-covered plans that provide group health benefits, regardless of size, would be required to file a Form 5500, including the new Schedule J (Group Health Plan Information), as well as any other applicable schedules. The changes were proposed to apply to plan years beginning on or after Jan. 1, 2019. However, it is unclear at this point whether the Trump administration will move forward with the proposed changes.

## **FAMILY AND MEDICAL LEAVE ACT (FMLA)**

The FMLA applies to private sector employers with **50 or more employees in 20 or more workweeks** in the current or preceding calendar year, as well as to all public agencies and all public and private elementary and secondary schools. The FMLA provides eligible employees with job-protected leave for certain family and medical reasons. An employer must maintain group health coverage during the FMLA leave at the level and under the conditions that coverage would have been provided if the employee had not taken leave. The FMLA requires employers to provide the following notices/disclosures:

- **General Notice**—Covered employers must prominently post a general FMLA notice where it can be readily seen by employees and applicants for employment. If the employer has any FMLA-eligible employees, it must also include the general notice in the employee handbook or other written employee guidance or distribute a copy of the notice to each employee upon hiring.
- **Eligibility/Rights and Responsibilities Notice**—Written guidance must be provided to an employee when he or she notifies the employer of the need for FMLA leave. The employer must detail the specific expectations and obligations of the employee, and explain the consequences for failing to meet these obligations.

- **Designation Notice**—After the employer has sufficient information, it must provide a designation notice informing the employee whether the leave is designated as FMLA leave.

[Model forms](#) are available from the DOL.

## GENETIC INFORMATION NONDISCRIMINATION ACT (GINA)

GINA applies to group health plans and health insurance issuers. **There is not an exception for small employers.**

GINA prohibits health plans and health insurance issuers from discriminating based on genetic information. GINA generally prohibits group health plans and health insurance issuers from: (1) adjusting group premium or contribution amounts on the basis of genetic information; (2) requesting or requiring an individual (or their family members) to undergo a genetic test; and (3) collecting genetic information, either for underwriting purposes or prior to or in connection with enrollment.

## HIPAA PORTABILITY

HIPAA's portability rules apply to group health plans and health insurance issuers, unless an exception applies. Plans with fewer than two participants who are current employees (for example, retiree health plans) are exempt. **There is not an exception for small employers.**

HIPAA's portability rules are designed to help individuals transition from one source of health coverage to another. HIPAA's portability provisions limit exclusions for pre-existing conditions, prohibit discrimination based on health status and provide for special enrollment opportunities. Effective for plan years beginning on or after Jan. 1, 2014, the ACA prohibits group health plans and issuers from imposing pre-existing condition exclusions on any enrollees.

HIPAA's portability rules require the following notices/disclosures:

- **Notice of Special Enrollment Rights**—Plans and issuers must provide the special enrollment rights notice at or before the time an employee is initially offered the opportunity to enroll in the plan.
- **Notice of Alternative Wellness Program Standard**—Group health plans and issuers that offer health-contingent wellness programs must disclose the availability of an alternative standard to receive a reward under the wellness program. This disclosure must be included in all materials that describe the wellness program.

## HIPAA PRIVACY AND SECURITY

The HIPAA Privacy and Security Rules apply to health plans, health care clearinghouses and health care providers that transmit health information electronically (covered entities), unless an exception exists. The rules also apply to business associates (service providers to covered entities) that use protected health information (PHI). **A self-funded health plan with fewer than 50 participants that is administered by the employer that established and maintains the plan is exempt.**

The HIPAA Privacy Rule governs the use and disclosure of an individual's PHI. The HIPAA Security Rule creates standards with respect to the protection of electronic PHI. The HIPAA Privacy and Security Rules require the following notices/disclosures:

- **Notice of Privacy Practices**—Plans and issuers must provide a Notice of Privacy Practices when a participant enrolls, upon request and within 60 days of a material revision. At least once every three years, participants must be notified about the notice's availability.
- **Notice of Breach of Unsecured PHI**—Covered entities and their business associates must provide notification following a breach of unsecured PHI without unreasonable delay and in no case later than 60 days following the discovery of the breach.

**Special Rules for Fully Insured Plans**—The plan sponsor of a fully insured health plan has limited responsibilities with respect to the Notice of Privacy Practices. The extent of these responsibilities depends on whether the plan sponsor has access to PHI for plan administration purposes.

- ✓ If the sponsor of a fully insured plan has access to PHI for plan administrative functions, it is required to maintain a Privacy Notice and to provide the notice upon request.
- ✓ If the sponsor of a fully insured plan does not have access to PHI for plan administrative functions, it is not required to maintain or provide a Privacy Notice.

A plan sponsor's access to enrollment information, summary health information and PHI that is released pursuant to a HIPAA authorization does not qualify as having access to PHI for plan administration purposes.

## CHILDREN'S HEALTH INSURANCE PROGRAM REAUTHORIZATION ACT (CHIPRA)

States may offer eligible low-income children and their families a premium assistance subsidy to help pay for employer-sponsored coverage. If an employer's group health plan covers residents in a state that provides a premium subsidy, the employer must send an annual notice about the available assistance to all employees residing in the state. **There is not an exception for small employers.** A [model notice](#) is available from the DOL.

## MEDICARE PART D CREDITABLE COVERAGE DISCLOSURES

The Medicare Part D requirements apply to group health plan sponsors that provide prescription drug coverage to individuals who are eligible for Medicare Part D coverage. **There is not an exception for small employers.**

Employer-sponsored health plans offering prescription drug coverage to individuals who are eligible for coverage under Medicare Part D must comply with the following disclosure requirements:

- **Disclosure Notices for Creditable or Non-Creditable Coverage**—A disclosure notice must be provided to Medicare Part D eligible individuals who are covered by, or apply for, prescription drug coverage under the employer's health plan. The purpose of the notice is to disclose the status (creditable or non-creditable) of the group health plan's prescription drug coverage. It must be

provided at certain times, including before the Medicare Part D Annual Coordinated Election Period (Oct. 15 through Dec. 7 of each year).

- **Disclosure to CMS**—On an annual basis (within 60 days after the beginning of the plan year) and upon any change that affects the plan’s creditable coverage status, employers must disclose to the Centers for Medicare and Medicaid Services (CMS) whether the plan’s coverage is creditable.

[Model forms](#) are available from CMS.

## MENTAL HEALTH PARITY AND ADDICTION EQUITY ACT (MHPAEA)

The MHPAEA imposes parity requirements on group health plans that provide benefits for mental health or substance use disorders (MH/SUD). For example, plans must offer the same access to care and patient costs for MH/SUD benefits as those that apply to general medical or surgical benefits.

The MHPAEA applies to group health plans offering MH/SUD benefits. There is an exception for health plans that can demonstrate a certain cost increase and an exception for small health plans with fewer than two participants who are current employees (for example, retiree health plans). **There is also an exception for employers with 50 or fewer employees during the preceding calendar year.** However, in order to satisfy the essential health benefits requirement, MH/SUD benefits must be provided in a manner that complies with the MHPAEA. Thus, through this ACA mandate, small employers with insured plans are also subject to the mental health parity requirements.

Under the MHPAEA, the plan administrator or the health insurance issuer must disclose the criteria for medical necessity determinations with respect to MH/SUD benefits to any current or potential participant, beneficiary or contracting provider upon request and the reason for any denial of reimbursement or payment for services with respect to MH/SUD benefits.

## MICHELLE’S LAW

Michelle’s Law applies to employer-sponsored group health plans. Plans with fewer than two participants who are current employees (for example, retiree health plans) are exempt. **There is not an exception for small employers.**

Michelle’s law ensures that dependent students who take a medically necessary leave of absence do not lose health insurance coverage. If a health plan requires a certification of student status for coverage, plan administrators and issuers must include a description of Michelle’s Law with any notice regarding a requirement for certification of student status.

Michelle’s Law was enacted before the ACA required group health plans to provide coverage for dependent children up to age 26, regardless of student status. Now that the ACA’s coverage expansion for dependents is effective, Michelle’s Law has limited applicability. In general, it will only apply if a plan offers coverage for dependents who are not covered by the ACA mandate (for example, dependents who are older than age 26) and conditions eligibility on student status.

## **NEWBORNS' AND MOTHERS' HEALTH PROTECTION ACT (NMHPA)**

The NMHPA applies to group health plans that provide maternity or newborn infant coverage. **There is not an exception for small employers.**

Under the NMHPA, group health plans may not restrict mothers' and newborns' benefits for hospital stays to less than 48 hours following a vaginal delivery and 96 hours following a delivery by cesarean section. The plan's SPD must include a statement describing the NMHPA's protections for mothers and newborns.

## **WOMEN'S HEALTH AND CANCER RIGHTS ACT (WHCRA)**

The WHCRA applies to group health plans that provide coverage for mastectomy benefits. Plans with fewer than two participants who are current employees (for example, retiree health plans) are exempt. **There is not an exception for small employers.**

The WHCRA requires health plans that provide medical and surgical benefits for a mastectomy to cover: (1) all stages of reconstruction of the breast on which a mastectomy has been performed; (2) surgery and reconstruction of the other breast to produce a symmetrical appearance; and (3) prostheses and physical complications of mastectomy, including lymphedemas.

Plans must provide a notice describing rights under WHCRA upon enrollment and on an annual basis after enrollment.