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The Affordable Care Act Individual Mandate Tax Penalty and Indian Exemptions

Compliance Guide for Tribes and Tribal Health Programs

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This compliance guide provides information about the Affordable Care Act (ACA) health care coverage requirement (the “Individual Mandate”), including the tax penalty for failure to maintain health care coverage and exemptions to the tax penalty for Indians and other individuals eligible for services from the Indian Health Service (IHS) or a tribal or urban Indian health program (I/T/U). The compliance guide focuses on the two exemptions available to Indians and other I/T/U beneficiaries, and on how individuals can apply for and claim these exemptions in order to avoid a tax penalty for failure to maintain health insurance coverage.

➤ **What is the ACA “Tax Penalty”?**

The ACA requires that all individuals carry “minimum essential [health] coverage,” either through private insurance, a state or federally run health care “Marketplace” (also called an “Exchange”), or a government-run service like Medicare, Medicaid, or TRICARE.¹ All individuals who do not have health insurance coverage that meets the definition of “minimum essential coverage” are subject to a tax penalty, unless they qualify for an exemption or waiver.² Individuals with dependents (for example, children) will also be penalized if their dependents do not have minimum essential coverage.³ As explained below, Indians are exempt from the tax penalty under two

¹ 26 U.S.C. § 5000A.

² Individuals who do not pay federal taxes because their income is below the threshold are exempt. 26 U.S.C. § 5000A(e)(2).

³ 26 U.S.C. § 5000A(b)(3).

separate exemptions with different eligibility criteria and different rules for claiming the exemption.

The amount of the tax penalty is determined by a formula, and is smaller in 2014 than in later years. Essentially, the penalty in 2014 is equal to either 1% of the tax filer's household income, or \$95 per uninsured adult (half that amount for children under 18) in the household, whichever amount is higher. In 2015, the amount rises to 2% of household income or \$325 per adult, and in 2016 and later years the amount will be 2.5% of household income or \$695 per adult (with the amount adjusted for inflation after 2016). For all years, the amount of the penalty is capped at the national average yearly premium amount for a "bronze" level health insurance plan purchased on the Marketplace. The penalty amount is prorated monthly if the tax filer or any members of his or her household had insurance coverage for some months of the year but not others.

➤ What is the "Indian Exemption" and who is eligible?

The ACA specifically exempts nine categories of individuals from the tax penalty for failure to have health insurance coverage. One of these exemptions is for "members of Indian tribes."⁴ For purposes of the Indian Exemption, "Indian tribe" is defined as:

... any Indian tribe, band, nation, pueblo, or other organized group or community, including any Alaska Native village, or regional or village corporation, as defined in, or established pursuant to, the Alaska Native Claims Settlement Act (43 U.S.C. 1601 et seq.) which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians.⁵

The Administration has interpreted the Indian Exemption to cover only members of federally-recognized tribes. As a result, Indians (and other individuals, such as spouses or children) who are not members of federally recognized tribes are *not eligible* for the exemption even though they may be eligible to receive services from an I/T/U.

➤ What is the "Hardship Exemption" and who is eligible?

Because not all I/T/U beneficiaries are members of federally recognized tribes, not all I/T/U beneficiaries are eligible for the statutory Indian Exemption. However, in consultation with Indian tribes and tribal organizations, the Administration determined that non-member beneficiaries should not be penalized if they decide to rely on their right to receive services from an I/T/U to meet their health care needs, rather than obtain

⁴ 26 U.S.C. § 5000A(e)(3).

⁵ 26 U.S.C. § 45A; 45 C.F.R. § 155.600(a).

additional health insurance coverage.⁶ The Administration therefore used regulatory authority granted in the ACA to create a separate exemption for non-member beneficiaries.

The ACA allows the Secretary of Health & Human Services (HHS) to exempt individuals from the tax penalty if those individuals are determined by the Secretary “to have suffered a hardship with respect to the capability to obtain coverage under a qualified plan.”⁷ Under this authority, HHS has issued regulations creating a category of “hardship exemption” for (among others) individuals who are eligible for services through an I/T/U but are not members of a federally recognized tribe. The regulation states:

(6) Eligible for services through an Indian health care provider. (i) The Exchange must determine an applicant eligible for an exemption for any month if he or she is an Indian eligible for services through an Indian health care provider, as defined in 42 CFR 447.50 and not otherwise eligible for an exemption under paragraph (f) of this section [the Indian Exemption], or an individual eligible for services through the Indian Health Service in accordance with 25 USC 1680c(a), (b), or (d)(3).⁸

42 C.F.R. § 447.50 defines “Indian health care provider” as “a health care program operated by the Indian Health Service (IHS) or by an Indian Tribe, Tribal Organization, or Urban Indian Organization (otherwise known as an I/T/U) as those terms are defined in section 4 of the Indian Health Care Improvement Act (25 U.S.C. 1603).”

Accordingly, individuals who are not eligible for the Indian Exemption because they are not members of federally recognized tribes, but who are eligible for services through an I/T/U, are eligible to claim the Hardship Exemption from the tax penalty if they would prefer not to purchase separate insurance.

➤ **How can an individual apply for the Indian Exemption or the Hardship Exemption?**

The IRS will not apply either the Indian Exemption or the Hardship Exemption to eligible individuals automatically. Rather, the exemptions must be claimed. Currently, there are different rules governing how an individual can claim the Indian Exemption and the Hardship Exemption.

Members of federally recognized tribes can claim the statutory Indian Exemption in two ways. First, they can state that they are a member of a federally recognized tribe

⁶ Eligibility for services at an I/T/U is not considered “minimum essential coverage” under the statute, so an I/T/U beneficiary is subject to the penalty unless he or she either obtains health insurance coverage or is eligible for an exemption. 26 U.S.C. § 5000A(f).

⁷ 26 U.S.C. § 5000A(e)(5).

⁸ 42 C.F.R. § 155.605(g)(6).

on their tax return when they file taxes for 2014. Alternatively, they can submit an application to have the federal or state Health Insurance Marketplace (also known as Exchange) issue an Exemption Certificate Number. The Exemption Certificate Number must then be used on a federal tax return to claim the exemption.

Individuals who are not eligible for the Indian Exemption, but who are eligible for the Hardship Exemption, *must submit the Hardship Exemption application form* to the state or federal Marketplace and use the Exemption Certificate Number to claim the exemption on their federal tax returns. Currently, there is no other way to claim the Hardship Exemption. Likewise, parents with children who are eligible for the Hardship Exemption but not members of federally recognized tribes must submit application forms to have their children designated as eligible.

The application form – which can be used to apply for either the Indian Exemption or the Hardship Exemption (and which can be used by families to claim the Indian Exemption for some members and the Hardship Exemption for other members) is attached to this compliance guide. It is also available from your Exchange or at <https://www.healthcare.gov/exemptions/>. Note that state Exchanges have the option to create their own form, which must be approved by IHS. Therefore, individuals in states that do not utilize the Federally Facilitated Exchange should check to be sure they are using the right form.

➤ **What should applicants know when filling out the application form?**

HHS plans to release detailed instructions soon to assist individuals in filling out the application form. The instructions have been developed in consultation with the Tribal Technical Advisory Group (TTAG).

The application should be used by an individual who will file a federal tax return *if any member of that filer's tax household* will be claiming the Hardship Exemption (or, on an optional basis, if any member of the household will be claiming the Indian Exemption). For example, a parent of eligible children should submit the application to claim the exemption for his or her children, even if the parent is not eligible himself or herself. Only one adult in each tax household should fill out the application form, but that adult should include information on every individual in the household that is eligible for one of the exemptions. The adult who fills out the application form will be the “contact person” for the application and will be required to provide information about himself or herself in “Step 1” of the application form.

Applicants for an exemption, or individuals filling out the application form on behalf of dependents who are claiming an exemption, must then provide information about themselves and about all members of their tax household for whom they would like to request an exemption in “Step 2” of the application form. Though the information may be redundant, the individual filling out the application must start with himself or herself. With respect to each member of the household for whom an exemption is claimed, every

question in “Step 2” of the form should be answered to the extent possible. If the household member qualifies as a member of an Indian tribe, the application filer should check “Yes” both for question 7 (“Are you a member of an Indian tribe?”) *and* question 9 (“Are you eligible to get services through an Indian health care provider?”). If questions 10 and 11 (relating to individuals who are eligible only because they are spouses of Indians and to individuals who know their eligibility for I/T/U services will eventually end) are not applicable, the application filer should leave them blank even though the form instructs the application filer to answer them. Once complete, the application form must be signed and dated by the same person who provided his or her information in “Step 1” and whose information was provided first in “Step 2.”

Documentation showing eligibility for the claimed exemption for each individual included in the application must be submitted with the application form. The instructions will include a detailed list of acceptable documentation; however, for non-member individuals claiming the Hardship Exemption, a letter from an IHS, Tribal or urban Indian health care provider on facility letterhead, with an official signature, verifying eligibility for services is sufficient. For members of Indian tribes, an enrollment or membership card with a tribal seal or official signature, or a Certificate of Degree of Indian Blood (CDIB) with tribal enrollment information issued by a Tribe or the Bureau of Indian Affairs, is sufficient proof of tribal membership. Other documentation may be acceptable as well for either exemption, as described in the instructions. Only *copies of these documents* should be provided – not the originals.

Individuals who fill out and submit an application to the state or federal Marketplace should keep a copy of the completed application form and all documents submitted with it for their personal records. In addition, if the exemption is granted and the Marketplace issues Exemption Certificate Numbers for any member of the tax household, all documents received from the Marketplace should be kept as proof of receipt of the exemption.

➤ **Does an individual who is eligible for the Indian Exemption or the Hardship Waiver need to reapply every year to avoid the tax penalty?**

No. Once an individual has submitted an application form to the state or federal Marketplace and has been issued an Exemption Certificate Number to use on federal income tax forms, it is not necessary for that individual to re-apply. He or she can continue to use the same Exemption Certificate Number to claim the exemption each year unless his or her status as a member of a federally recognized tribe or as an individual eligible for services from an I/T/U changes. If a change in status occurs, the individual is required to report the change the Marketplace.

➤ **What can our Tribe or Tribal Health Program do to help our members and beneficiaries ensure they receive the exemption if they need it?**

Many Tribes and Tribal Health Programs are encouraging members and beneficiaries to consider enrolling in minimum essential coverage even though they are not required to maintain coverage under the ACA. Many members and beneficiaries could be eligible for free or very low cost coverage and entitled to special benefits, like exemptions or limits on premiums and cost sharing, through Medicaid Expansion or through the Marketplace. When beneficiaries are covered, tribal health programs benefit from the ability to bill for services provided to supplement their program funding. Tribal members and beneficiaries who do choose to maintain minimum essential coverage do not need to claim an exemption to the tax penalty, because they will not be subject to the penalty by virtue of their health care coverage.

Still, many tribal members or health program beneficiaries may choose to forego independent health care coverage and continue to rely on their eligibility for services from an I/T/U. Those members and beneficiaries may need assistance in claiming an exemption in order to avoid a tax penalty. There are several ways your Tribe or Tribal Health Program can help:

- ✓ **Educate your tribal members and program beneficiaries.** Individual tribal members and beneficiaries may not have all the information they need to understand the ACA's requirement to maintain minimum essential coverage or the availability and eligibility criteria of the Indian exemptions. Tribes and Tribal Health Programs can help fill in the gaps by taking the opportunity to educate members and beneficiaries. There are many ways to do this – consider mailings or newsletter columns, information and training sessions in your community, post notices or provide leaflets in tribal offices and facilities, or talk to patients when they come in for an appointment.

Check <http://tribalhealthcare.org/> and the “helpful links” below periodically for prepared handouts and other resources for community outreach and education.

- ✓ **Make sure members and beneficiaries understand the difference between the Indian Exemption and the Hardship Exemption, and the differences in how to claim them.** Since the Hardship Exemption for non-member beneficiaries can only be claimed by applying through the Marketplace (Exchange), while the Indian Exemption for members of federally recognized tribes can be claimed either through the Marketplace or on a federal tax return, it is important that individuals understand the difference and figure out ahead of time which exemption(s) they and their family members can claim. Again, your Tribe or Tribal Health Program can help by providing clear, easy-to-understand information about the exemptions and the process for claiming them.

- ✓ **Make sure adult members and beneficiaries understand that they need to claim exemptions for their children (dependents) as well, if they qualify.** Parents will be penalized if their children do not have minimum essential coverage unless they claim an exemption. This means that parents who are tribal members but whose children are *not* tribal members will need to use the Hardship Exemption application form to apply for Exemption Certificate Numbers for their children, even though they may claim their own exemption on their tax return without first applying.
- ✓ **Prepare, and offer to provide, eligibility letters for beneficiaries to submit as proof of eligibility for the exemptions.** Individuals applying for either exemption are required to provide documentation demonstrating their eligibility. For individuals applying for the Hardship Exemption for non-member beneficiaries, a letter from any I/T/U facility (on facility letterhead, with an official signature) confirming that the individual is eligible for services from that facility is sufficient documentation. To assist beneficiaries in claiming the Hardship Exemption, then, I/T/U facilities can begin by putting in place a system to efficiently produce and provide eligibility letters to each of their beneficiaries. These letters could be pre-generated from the I/T/U facility's database of beneficiaries (the RPMS) and made available upon request, or even mailed automatically to every beneficiary in the database. Additionally, an I/T/U should consider putting in place a verification process for individuals who are not in the database but believe they may be eligible for services from the I/T/U, and therefore eligible for the Hardship Exemption.
- ✓ **Provide assistance to individuals filling out the exemption application form, or let them know where they can go for assistance.** Many individuals may find the form confusing and would benefit from assistance in completing the form. Using the information in this compliance guide and the detailed instructions that will be released to accompany the form, Tribes and Tribal Health Programs should consider training staff to provide in-person or over-the-phone assistance to individuals using the application form to apply for the exemptions.

ADDITIONAL RESOURCES

Healthcare.gov American Indians and Alaska Natives Q&A:

www.healthcare.gov/tribal

Healthcare.gov Exemptions Resources:

www.healthcare.gov/exemptions/

Indian Health Service Affordable Care Act Page:

www.ihs.gov/aca/acayou/

National Indian Health Outreach and Education Initiative (NIHOE):

<http://tribalhealthcare.org/>

CMS American Indians and Alaska Natives Publications:

<http://marketplace.cms.gov/getofficialresources/publications-and-articles/american-indian-and-alaska-native-publications.html>

For more information about the ACA tax penalty, the Indian Exemption, or the Hardship Exemption, or for questions about eligibility criteria and how to apply, please feel free to contact Elliott Milhollin at (202)822-8282 or emilhollin@hobbsstrauss.com; Geoff Strommer at (503)242-1745 or gstrommer@hobbsstrauss.com; or Caroline Mayhew at (202)822-8282 or cmayhew@hobbsstrauss.com.

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