# *LEGISLATIVE AND REGULATORY UPDATE*

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**New health FSA guidance permits up to $500 carryover:** Long-awaited guidance from the Treasury Department and IRS (**Notice 2013-71 (IRS, 31 Oct 2013, 9 pages)** modifies the "use it or lose it" rule for health flexible spending arrangements (health FSAs). Plan sponsors now may let participants carry over up to $500 of their unused balances from one plan year to the next. The existing option to offer a 2-1/2–month grace period remains, but plans can't have both a grace period and a carryover option. The guidance adds welcome flexibility but creates special issues for employers offering — and participants in — high-deductible health plans (HDHPs) with health savings accounts (HSAs). Sponsors of calendar-year plans that want to offer the carryover feature for 2013 balances should act quickly to do so. This article summarizes the new guidance and discusses its potential impact on HSA eligibility.

***New carryover exception to use-it-or-lose-it rule***

For almost 30 years, the FSA use-it-or-lose-it rule has meant that participants must forfeit amounts not used for qualifying expenses incurred by plan year-end. This rule may have deterred some employees from contributing to a health FSA. In 2005, IRS guidance eased the use-it-or-lose-it rule by permitting FSAs to offer a "grace period". This option allows participants to use a prior year's unspent health or dependent care FSA balance for expenses incurred during the first 2-1/2 months (or any shorter period set by the plan) of the next plan year.

Regulators now have added a carryover alternative to the health FSA grace period. For employers considering this option, the guidance provides these details:

- Up to $500 of "unused amounts" may carry over from one plan year to the next.
  - Unused amounts — counting both salary reductions (including cashable flex credits) and nonelective employer flex credits — are determined at end of any run-out period for plan-year expenses (see run-out discussion).
  - A carryover from one plan year does not affect a participant's ability to carry over up to $500 in unused health FSA funds at the close of the next and subsequent plan years.
- Any carryover is in addition to a participant's maximum permitted salary reduction of $2,500 and any nonelective employer flex credits.
- Employers that decide to permit carryovers can set the limit at less than $500, but the same carryover rules must apply to all plan participants.
- Carryovers are subject to the uniform coverage rule that applies to all health FSAs.
  - The maximum reimbursement available at any time during plan year is the sum of a participant's current-year salary reduction, nonelective employer flex credits (if any), and carryover amount, reduced by any reimbursements or payments already made for same period of coverage.
- Participants must forfeit any carryover and all other "unused amounts" at employment termination (unless COBRA is elected).

- A health FSA cannot allow both a $500 carryover and a 2-1/2–month grace period.

- Employers may amend their cafeteria plans to adopt the health FSA carryover option for 2013 plan year. To permit carryovers, however, plans that currently have a health FSA grace period must eliminate this option.

***Timing of switch from grace period to carryover.*** IRS cautions that amendments replacing an existing health FSA grace period with the $500 carryover for the current plan year may be "subject to non-Code legal constraints." Because the health FSA carryover is limited to $500, midyear replacement of a grace period could adversely affect participants anticipating higher medical expenses early in the coming plan year. For example, a participant in a calendar-year plan that offers a grace period might schedule an expensive surgery for January 2014, expecting to have the full $2,500 health FSA election from 2013 to help cover the cost. Disgruntled participants in this position might sue to have their employer "estopped" from eliminating the grace period. However, these types of lawsuits rarely succeed under ERISA — especially since many health FSA sponsors reserve the right to amend or terminate their plans at any time and for any reason.

Nonetheless, employers that currently offer FSA grace periods may want to pre-empt potential participant discontent and litigation by switching to carryovers at the start of a plan year (with plenty of prior notice) rather than midyear. For example, a plan could keep a grace period for 2013 plan-year expenses (submitted in the first 2-1/2 months of the 2014 plan year) but adopt an amendment early in the 2014 plan year to substitute the $500 carryover. Carryovers from the 2014 plan year would then be available in the 2015 plan year. Of course, some employers will decide to continue grace periods rather than change to carryovers. Other plans will continue to have neither.

***Carryovers and run-out periods***

Plans with health FSA carryovers can continue to use run-out periods — limited periods after plan year-end when participants can still submit expenses incurred during that plan year. For example, calendar-year plans often have a run-out period through March 31 of the next year. The full unused FSA balance at plan year-end remains available to pay *prior-year* expenses throughout the run-out period. Only after the run-out period for prior-year claims ends is the unused amount available for carryover determined.

> *Example.* Tatiana's employer adopts a health FSA carryover of up to $500 that can be carried forward from the 2013 plan year. Tatiana has an $800 balance in her health FSA at the end of 2013. Her calendar-year plan's run-out period is Jan. 1 to March 31. On Feb. 1, 2014, Tatiana submits $350 in eligible expenses incurred during 2013 and is reimbursed. She does not submit any other claims before the run-out period ends. When her unused health FSA amounts from 2013 are finalized after March 31, 2014, her carryover is $450 ($800 – $350).

Alternatively, the carryover can be used to pay expenses incurred in the *current* plan year — even before the run-out period for the prior plan year ends, as illustrated by the next example.

> *Example.* Noel works for the same employer as Tatiana and also has an $800 health FSA balance at the end of 2013. She elects to contribute $2,500 through salary reduction to her 2014 health FSA. In January 2014, she incurs $3,300 in unreimbursed medical expenses, and she submits the expenses to her health FSA. The plan reimburses her $3,000: the $500 she can carry over to 2014 and her $2,500 2014 salary reduction election. Noel can use the remaining $300 of her 2013 health FSA balance to cover only 2013 expenses submitted during the run-out period. If she doesn't exhaust that $300 with timely submitted 2013 expenses, she forfeits the balance.

***Carryovers and HSA eligibility***

Many employers now include HDHPs in their group health plans. Some only offer an HDHP with HSAs; others offer a choice of a traditional health plan, a health FSA, and an HDHP with HSAs. Under the HSA rules, however, participation in any health plan other than an HDHP (or certain excepted benefits) makes a person ineligible for HSA contributions for the whole year. A general-purpose health FSA, irrespective of its balance, is a type of group health plan that eliminates a participant's eligibility for HSA contributions. Even an FSA participant's spouse and dependents generally are ineligible for HSA contributions (unless the employer has limited its general-purpose health FSA to exclude spouses and dependents).

Carryover of any balance in a *general-purpose FSA* from one plan year to the next disqualifies a person from HSA eligibility for both plan years. However, regulators have informally said that two alternatives may prevent prior-year carryovers under a general-purpose health FSA from affecting HSA eligibility for the ensuing year. Employers may consider designing their plans to offer either or both of these options:

- *Permit participants to opt out of the carryover and forfeit any unused amounts in the general-purpose health FSA at plan year-end.* This would allow employees opting out of the carryover to participate in the HSA for the subsequent plan year. Employees who fail to opt out and instead carry over any unused general-purpose FSA amounts into the next plan year would disqualify themselves — and usually their spouses and dependents — from HSA eligibility.

- *Allow employees to elect to participate in a limited-purpose health FSA (i.e., dental, vision, or preventive care only) for the next plan year.* If the carryover from a general-purpose health FSA goes into a limited-purpose health FSA, the employee — and an otherwise eligible spouse or dependent — remains eligible for HSA contributions.

Like any cafeteria plan election, either of these FSA elections intended to preserve HSA eligibility must be made before the start of the ensuing plan year. This is true even though employees may not know whether they have any carryover until the run-out period is over. As a result, the carryover opt-out and/or limited-purpose health FSA elections should be drafted to accommodate unknown carryover amounts. For example, an employee might elect to opt out of a carryover that falls below a certain dollar amount (e.g., $50). Or an employee might elect to have any carryover go into a limited-purpose health FSA.

Alternatively, these options could be structured as negative (or default) elections. For example, an employee with less than $50 left in a general-purpose FSA at the end of the plan year (or run-out period) could be defaulted to opt out of any carryover. Or an employee with a general-purpose FSA carryover exceeding $50 could be defaulted into a limited-purpose health FSA. But in either case, the employee must be able to opt out of the default elections.

***Next steps***

Employers should carefully study whether — and when — to offer carryovers. Employees whose plans don't have grace periods probably will welcome a carryover option, but employers should consider the potential administrative complexity and added cost. On the other hand, employers whose plans currently provide a health FSA grace period need to weigh the pros and cons of allowing carryovers instead. Employers wanting to permit carryovers from the 2013 plan year also should check whether their health FSA vendors will be ready to administer the new feature next year.

Any employer that decides to offer carryovers must amend its plan and communicate the new option to employees. These tasks will be more complex for employers seeking to preserve HSA eligibility for employees (and their spouses/dependents).

***Choosing between carryovers and grace periods***

Employers that currently offer an FSA grace period will want to compare it to the carryover alternative before making any change. The chart below summarizes some key features of each option.

| Feature | Carryover | Grace period |
|---|---|---|
| Maximum permitted | Up to $500 of unused amount at end of PY 1 (calculated at end of run-out period) | Up to unused amount at end of PY 1 |
| Effect on maximum $2,500 salary reduction election amount in next PY | None | None |
| Spending accounts included | Health FSA | Health or dependent care FSA |
| Length of time unused amounts available | Entire PY 2, and up to $500 of unused amount at end of PY 2 can be carried over to subsequent PYs | First 2-1/2 months of PY 2 |
| Forfeiture events | To the extent that, combined with all other unused amounts at end of plan year, exceed $500<br><br>Termination of participation in health FSA (unless COBRA elected) | End of grace period in PY 2<br>Termination of participation in health FSA before last day of PY 1 (unless COBRA elected)<br><br>If lose health FSA eligibility *during grace period*, continued access to unused amounts until end of grace period |

| Feature | Carryover | Grace period |
|---|---|---|
| Impact on HSA eligibility (see discussion above) | No HSA eligibility for PY 2 with carryover to general-purpose health FSA<br><br>HSA eligibility may be available with opt-out of carryover from PY 1 or use of limited-purpose health FSA for carryover in PY 2 | No HSA eligibility for first 3 months of PY 2 with carryover to general-purpose health FSA, unless zero balance on last day of PY 1 or employer converts entire plan to limited-purpose health FSA |

### *If carryover chosen, amend plan and communicate with employees*

Employers generally must amend health FSAs to add a carryover feature by the last day of the first plan year from which carryovers will be allowed. The amendment can be retroactive to the first day of the plan year, as long as the plan is operated consistently with the carryover guidance and the employer notifies participants of the new provision.

**Transition rule for 2013–2014 plan years.** Under a special transition rule, employers have until the last day of the plan year beginning in 2014 to add carryover provisions for the plan year beginning in 2013.

> *Example.* Anvil Inc. decides to allow carryovers in its calendar-year plan, retroactively effective to Jan. 1, 2013. Although formal plan amendment for this change is not required until Dec. 31, 2014, Anvil should notify plan participants of the new carryover option by the end of 2013 and administer carryovers consistently with IRS guidance throughout 2014. If the open-enrollment period for the 2014 plan year has closed by the time Anvil decides to allow carryovers, it may want to let participants change their 2014 health FSA elections — if administratively feasible to do so before the end of the year. While adding a carryover feature does not require employers to permit new FSA elections, employees may want to change their salary-reduction amounts or direct the carryover to a limited-purpose health FSA.

**Switching from grace period to carryovers.** To switch from providing a grace period to offering carryovers, employers must eliminate the grace period by the end of the first plan year from which carryovers will be allowed — and before the grace period for that plan year begins. This deadline is Dec. 31, 2013, for any calendar-year plan wanting to permit carryovers from the 2013 plan year into 2014. Under the transition rule, calendar-year employers technically have until Dec. 31, 2014, to amend their plans to add the carryover provision. As a practical matter, however, most employers will want to eliminate the grace period and add the carryover in the same amendment.

**Participant communications.** Employers should develop a communications strategy for notifying participants of the change. Plan administrators also may need to prepare a summary of material modifications (SMM) or an updated summary plan description (SPD).

**Meeting religious exceptions to ACA's contraceptive-coverage mandate for 2014**: Religious employers remain exempt from covering contraceptives under a final Affordable Care Act rule. However, other nonprofits — such as hospitals, universities, and charities — that have religious objections to contraceptives must act to maintain or obtain relief after the 2013 plan year ends. Steps include signing a new self-certification, furnishing it to the insurers or TPAs that will arrange separate contraceptive coverage, and notifying enrollees about the plan's exception by the start of each plan year. Dozens of lawsuits challenging the mandate make US Supreme Court review likely.
**Final ACA rule on religious exceptions from contraceptive-coverage mandate (Federal Register, 2 Jul 2013, 31 pages) »;**

**Press release on final contraceptive-coverage rule for nonprofit religious organizations (HHS, 28 Jun 2013, 1 page) »**

**Fact sheet on ACA preventive services for women and nonprofit religious groups (CCIIO, 28 Jun 2013, 2 pages) »**

**Fact sheet on ACA preventive-services rules for women (HHS, 28 Jun 2013, 3 pages) »**

**US civil rights laws may protect expatriate workers:** Most US employment laws provide no protection to employees working in other countries. However, Congress has the power to extend such laws extraterritorially and did so — subject to several conditions — in the Age Discrimination in Employment Act (ADEA), Title VII of the Civil Rights Act of 1964 (Title VII), and the Americans with Disabilities Act (ADA). As international assignments increase with the global economy, employers face the difficult task of determining when these statutes apply to expatriate employees.

***Protections wane at the border***

US employment laws regulate a wide range of workplace activity, including safety, wages, equal employment opportunity, disability accommodations, leaves of absence, and labor-management relations. While most of these laws affect only US worksites, three civil rights statutes— the ADEA, Title VII, and the ADA — explicitly cover employees working overseas. The following table summarizes major federal employment laws and the extent to which they govern conduct occurring outside the US.

| Law | Purpose | Extraterritorial? | Limits on extraterritorial reach |
|---|---|---|---|
| Age Discrimination in Employment Act | Protects employees ages 40 and older from age-based employment discrimination | Yes | Employees must be US citizens.<br>Employer must be US corporation or controlled by US corporation.<br>No protection if compliance would cause employer to violate host country's laws |

| Law | Purpose | Extraterritorial? | Limits on extraterritorial reach |
|---|---|---|---|
| Title VII of the Civil Rights Act of 1964 | Protects employees from race, color, national origin, religion, and gender-based employment discrimination | Yes | Same as ADEA |
| Americans with Disabilities Act | Protects employees from disability-based employment discrimination and requires reasonable accommodations | Yes | Same as ADEA |
| Fair Labor Standards Act | Sets minimum wages, overtime pay, and other labor standards | Generally no, but may apply when expatriate performs part of a workweek in the US | |
| National Labor Relations Act | Protects employees' right to organize, bargain, and take other "concerted actions" | No | |
| Family and Medical Leave Act | Entitles eligible employees to unpaid leave for certain family and medical reasons | No | |
| Equal Pay Act | Prohibits employers from paying employees of one gender less for jobs requiring equal skill, effort, and responsibility | No | |
| Occupational Safety and Health Act | Sets minimum standards for workplace safety | No | |
| Worker Adjustment and Retraining Notification (WARN) Act | Requires advance notice to employees of plant closings and mass layoffs | No, but expatriates count in determining whether employer is covered | |

***Conditions complicate compliance***

The conditions placed on extraterritoriality make it harder to determine exactly when the ADEA, Title VII, and ADA cover particular expatriate employees. An employer must decide whether it is a US company or controlled by a US company, whether the expatriate employee is a US citizen, and in some cases, whether the statute's requirements clash with the laws of the country where the employee works.

**Laws cover US companies.** Extraterritoriality applies only if the expatriate works for a US employer, such as a company incorporated in the US, or an entity under the control of a US employer. Four factors determine whether a US employer controls a foreign affiliate:

- The interrelation of operations between the US company and foreign affiliate
- Their common management
- The extent of centralized control over their labor operations (usually given the most weight)
- Their common ownership and financial control

The more "integrated" the US and foreign employers, the more likely a court will find control exists. In an illustrative case, a federal district court ruled that a joint venture owned by US corporations had enough control over a Cayman Islands subsidiary to make the subsidiary an employer subject to Title VII (***Watson v. CSA, Ltd.*** **(D. Md. May 23, 2005)**). Applying the four factors, the court noted that (i) the parent and subsidiary shared an HR department responsible for employees of both companies, (ii) the parent had significant say over the subsidiary's employment policies, (iii) directors and high-level employees had management duties for the parent and subsidiary, and (iv) the subsidiary supervisor who allegedly violated Title VII was also an employee of the parent.

**Laws protect US citizens.** Extraterritoriality applies only to US citizens. Foreign nationals, including legal permanent residents, have no ADEA, Title VII, or ADA rights when working abroad.

**Contrary non-US law may excuse noncompliance.** Even if an expatriate qualifies for ADEA, Title VII, or ADA protection, an employer may be allowed to ignore these statutes when compliance would contravene the laws of the country where the employee works. While courts and the EEOC have not always agreed about the scope of this exception, its purpose is clear — to spare employers from having to satisfy inconsistent legal requirements. In one case taking a broad view of the exception, a US not-for-profit corporation located in Munich, Germany, signed a collective bargaining agreement (CBA) with a provision requiring employees to retire at age 65 (***Mahoney v. RFE/RL, Inc.*** **(D.C. Cir. Feb. 28, 1995)**). Though common in German labor contracts and enforceable under that country's laws, the provision violated the ADEA, which generally outlaws mandatory retirement policies. Nevertheless, the DC Circuit Court of Appeals said the CBA trumped the ADEA, absolving the employer of liability for firing employees who turned 65.

### *Conclusion*

The growing global economy may spur clarifications, expansions, or other changes to the extraterritoriality of US employment laws. For now, employers should carefully review the requirements of US and foreign laws before sending employees on expatriate assignments. Extending US best practices to these employees — including strong, written anti-discrimination policies and training — may help mitigate ADEA, Title VII, and ADA exposure. Besides watching out for potential conflicts of law, employers should consider whether compliance with US laws might offend a host country's customs and culture, possibly causing international, customer, and/or employee-relations problems.

**401(k) SPDs that incorporate SEC filings may pose litigation risk:** Statements in SEC filings incorporated by reference into a 401(k) plan's summary plan description (SPD) can give rise to fiduciary liability in company stock-drop litigation, the 9th US Circuit Court of Appeals has ruled (***Harris v. Amgen, Inc.*** **(9th Cir. Oct. 23, 2013)**). This new ruling — which replaces a June opinion by the same court — could increase fiduciary exposure for company stock investments when the SPD and prospectus are combined in a single document. The decision is binding in the 9th Circuit, which includes California.

**Incorporating by reference is a fiduciary act.** In its latest ruling, the 9th Circuit reconsidered whether 401(k) plan fiduciaries conveyed misleading information to participants by incorporating the company's Forms 10-K and 8-K into the SPD. The defendants (the company as named fiduciary, the plan committees, and the board of directors) asserted that statements in SEC filings are made in a corporate (not fiduciary) capacity, so they cannot be considered in an ERISA suit for breach of loyalty. The court acknowledged that view "might be correct if these documents had only been filed and distributed as required under the securities laws" — in other words, without crossover into ERISA documents. But the court said the defendants acted in a fiduciary capacity when they explicitly incorporated the company's SEC filings into the SPD by reference.

That conclusion is consistent with a 6th Circuit opinion. The 2nd Circuit agrees that incorporating SEC filings in an SPD is a fiduciary act, although liability in that jurisdiction would arise only if the fiduciary knows the statements are false or lack a reasonable basis in fact. Also, fiduciaries have no independent duty to investigate the veracity of SEC filings, unless public information indicates such an investigation is merited, the 2nd Circuit says.

Other findings from the 9th Circuit's June opinion remain unchanged. The court concluded that 401(k) plan terms must require or encourage company stock investments for fiduciaries to enjoy the "*Moench* presumption" of prudence. The court also said complying with ERISA wouldn't have required the fiduciaries to violate US securities laws (by trading on nonpublic information).

**Drafting tips.** In the past, killing two birds with one document may have seemed economical or convenient — for example, combining an SPD and securities prospectus to satisfy SEC rules and eliminate content overlap. However, this approach requires close internal coordination between securities and benefits staff, as well as coordination with an employer's securities counsel. While it's premature to label the recent rulings a trend, fiduciaries should at least consider whether the ERISA risk outweighs any potential advantages of combining documents.

**IRS fee discount for late 403(b) adopters expires Dec. 31:** Employers that offer 403(b) benefits but missed the 2009 deadline for adopting a written plan are running out of time to fix the problem for a reduced fee. The IRS is offering a 50% fee discount under the Voluntary Correction Program (VCP) to employers filing by Dec. 31, 2013, as long as late adoption of a written plan is the only failure identified in the VCP submission. Affected employers include public schools and 501(c)(3) tax-exempt organizations, such as hospitals and universities.

**Missed 2009 deadline.** Employers offering 403(b) benefits generally had to adopt a written plan by Dec. 31, 2009. Employers that failed to do so may use a VCP "submission kit" to correct the document defect. The usual VCP fee for this correction ranges from $750 (for plans with up to 20 participants) to $25,000 (for plans with more than 10,000 participants). To encourage quick action, the IRS cut the fee in half for employers adopting a written 403(b) plan and filing under VCP by 2013 year-end.

**Met 2009 deadline.** Employers that met the 2009 adoption deadline don't need to file under VCP — provided they follow through with any necessary remedial amendments by a date to be announced in future guidance. That announcement will be tied to the IRS's new preapproval program for 403(b) plans, which allows financial institutions, professional service firms, and other eligible sponsors to submit prototype and specimen plan documents for IRS advisory and opinion letters. When ready to issue the first round of letters, the IRS will announce a window (lasting at least 12 months) for employers to act. In general, employers will have to retroactively adopt either (i) a preapproved plan or (ii) any necessary remedial amendments to an individually designed plan. Employers using individually designed plans will have no assurance from the IRS that their plan terms meet all 403(b) requirements.

**Narrow church plan exception.** Churches meeting the narrow definition in Code Section 3121(w)(3)(A) and (B) needn't adopt a written plan unless the arrangement includes retirement income accounts. However, church plans generally must be in writing if maintained by church-related hospitals, colleges, nursing homes, and the like.

**USERRA's 'escalator' principle governs discretionary promotions, appeals court says:** The Uniform Services Employment and Reemployment Rights Act (USERRA) requirement to reinstate employees returning from military leave to their "escalator" positions applies to discretionary as well as automatic promotions, according to a recent decision of the 1st US Circuit Court of Appeals (***Rivera-Melendez v. Pfizer Pharms. LLC*** **(Sept. 20, 2013)**). With employees returning from Afghanistan, Iraq, and other military assignments, employers should fully understand their obligations under the act.

**Employers must provide escalator position.** USERRA generally requires employers to promptly re-employ qualifying employees once their military service ends. Employees are entitled to the jobs they would have had but for the military leave (their escalator positions). The jobs must reflect the "seniority, status, and rate of pay" the employees would have attained if continuously employed during military service, including promotions and prospects for future compensation and advancement. However, the escalator runs in both directions — the requirement also may result in demotions, layoffs, and terminations of employment.

**Court interprets escalator principle.** While Luis Rivera-Melendez ("Rivera") was serving in Iraq, his employer restructured his department, eliminating his job and filling its new "team leader" positions. Upon return, Rivera was given roles with the same salary and benefits as his prior job but fewer responsibilities. He sued under USERRA, claiming the employer should have promoted him to team leader. The district court found that promotions based on an employee's ability and employer's discretion, such as the one Rivera sought, were not subject to the escalator principle. But the 1st Circuit disagreed, ruling USERRA requires employers to give the promotions employees would have earned "with reasonable certainty," regardless of whether the promotions are automatic or discretionary. The 1st Circuit ordered the district court to decide whether it was reasonably certain Rivera would have been made a team leader but for his military service.

**USERRA demands attention.** Employers face difficult issues in complying with USERRA, especially its reinstatement requirements. An employer must determine what would have happened to an employee's seniority, pay, and status — including job opportunities, duties, working conditions, and location — had the employee not taken military leave. Failure to observe the act's requirements may cost employers back pay, liquidated damages, and other relief a court deems appropriate. Thus, employers should develop sound USERRA policies and practices and conduct training to ensure compliance plans are carried out effectively.

**Public exchange open enrollment shields individuals from penalties, HHS says:** Technical problems with the public health insurance exchange website have raised questions about whether individuals will have sufficient time to enroll to avoid the Affordable Care Act (ACA)'s individual mandate assessment. Addressing these concerns, the Department of Health and Human Services (HHS) issued guidance on Oct. 28, 2013, stating that individuals can enroll in public exchange coverage as late as March 31, 2014, without having to pay the assessment. Although these rules don't impact employer-sponsored coverage, employers may want to know how they work in order to determine the timing and structure of opt-outs required for employers sponsoring integrated health reimbursement arrangements for active employees, or simply to assist employees or early retirees not eligible for employer coverage.

***Public exchange enrollment is open for a limited time***. The initial open enrollment period for the public exchanges, or marketplaces, started on Oct. 1, 2013, and extends through March 31, 2014. Individuals who don't enroll during this time must wait until the next open enrollment period (Oct. 15, 2014, to Dec. 7, 2014) to sign up, unless they experience a special enrollment event (such as loss of minimum essential coverage).

Exchange rules set out the effective dates of coverage, which are based on enrollment completion (including selection of a qualified health plan).

| Date of enrollment | Effective date of coverage |
|---|---|
| On or before Dec. 15, 2013 | Jan.1, 2014 |
| Between the 1st and 15th day of January 2014, February 2014, or March 2014 | First day of the following month |
| Between the 16th and the last day of December 2013, January 2014, February 2014, or March 2014 | First day of the second following month |

Under these rules, an individual would have to enroll before Feb. 15, 2014, in order to have coverage effective before the end of March 2014.

***Individual mandate starts Jan. 1, 2014.*** The ACA's individual mandate requires individuals to have minimum essential coverage starting Jan. 1, 2014, unless an exemption applies. Under one exemption for "short coverage gaps," individuals without coverage for less than three continuous months after the Jan. 1 deadline do not have to pay an individual mandate assessment for those months. Individuals whose lapse in coverage exceeds three months, however, are subject to the assessment, unless another exemption applies.

***Example***. Jenny works part time for Barry's drug store. She is not eligible for coverage through her employer and has not had health coverage for several years. She enrolls in the Texas public exchange on March 17, 2014. Under exchange open enrollment rules, Jenny's exchange coverage will be effective on May 1, 2014. Because Jenny's lapse in health coverage will exceed three consecutive months, she would have to pay an individual mandate assessment when she files her 2014 tax returns in 2015.

***Guidance adds new individual mandate exemption.*** In its recent guidance, HHS noted it would be unfair to require individuals who enroll in coverage during the initial enrollment period to pay an assessment. But instead of extending the enrollment period, HHS established a new "hardship exemption": Any individual who enrolls in an exchange before the March 31, 2014, deadline will be able to claim an exemption from the assessment for the months before the effective date of the individual's coverage. HHS says that additional details on claiming this exemption will be available in 2014. Enrollment Period FAQ

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