

**BC** Benefit Comply  
Employee Benefit Compliance Support

April 2024

# Waves of Compliance

Presented by Benefit Comply

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## Benefit Comply Resources

- Back-office compliance support to help brokers, TPAs and employers navigate ACA, HIPAA, COBRA, ERISA, §125, and more
  - Compliance helpline
  - Compliance alerts, tools and guides
  - Compliance assessments and training
  - HIPAA solutions



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## Agenda

- Employer Mandate (§4980H)
- Benefit Nondiscrimination Rules
- Benefits for Owners & Independent Contractors
- Benefits for Domestic Partners

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# Employer Mandate (\$4980H)






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### §4980H (Employer Mandate) Requirements BC

**§4980H(a) - ALEs must offer minimum essential coverage to 95% (or all but 5, if greater) of full-time employees and dependent children**

- Penalty if any full-time employee enrolls in subsidized Marketplace coverage
- \$\$ X all full-time employees minus 30

**§4980H(b) - ALEs must offer coverage that provides minimum value AND is affordable to all full-time employees**

- Penalty for any full-time employee enrolled in subsidized Marketplace coverage
- \$\$ for each full-time employee who enrolls in subsidized Marketplace coverage

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### §4980H (Employer Mandate) Penalties BC

	2023	2024	2025
<b>§4980H(a)</b>	\$2,880 (\$240/mo.)	\$2,970 (\$247.50/mo.)	\$2,900 (\$241.66/mo.)
<b>§4980H(b)</b>	\$4,320 (\$360/mo.)	\$4,460 (\$371.67/mo.)	\$4,350 (\$362.50/mo.)

- Penalties apply monthly (1/12 of the annual penalty for each month the employer fails to satisfy §4980H requirements)
- Employer will never be subject to both (a) and (b) penalties
  - If the (a) penalty applies, that is the maximum penalty
- Penalties based on self-reporting via Forms 1094-C and 1095-C

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**Affordability Safe Harbors** BC

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**FPL** **Monthly cost cannot exceed % of FPL**

- 2024 Calendar year plan = \$101.93 or less per month (8.39% x \$14,580 / 12)
- 2024 Non-calendar year plan = ??? (8.39% x 2024 FPL / 12)

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**Rate of Pay** **Monthly cost cannot exceed % of hourly rate x 130 or monthly salary**

- Hourly Employees – Must use hourly rate as of the beginning of the coverage period, unless it is reduced
- Salaried Employees – If the monthly salary is reduced, this safe harbor is not available

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**Form W-2** **Annual cost does not exceed % of Box 1 wages**

- Employee's contribution must remain a consistent amount or percentage of Form W-2 wages during the year or this safe harbor is not available

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**1094/1095 ACA Reporting - IRS Enforcement** BC

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**Letter 5699 – Failure to File**

- IRS is reaching out to employers who appear to be ALEs (based on Form W-2s filed) and who did not report
- Employers must respond indicating non-ALE status, that reporting was already submitted, or that it will be submitted by XX date

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**Letter 226J – §4980H Proposed Penalties**

- IRS proposes assessments based on self-reporting of §4980H compliance (1094/1095s) and subsidized Marketplace enrollment
- Opportunity to appeal and reduce penalties if coverage was offered as required

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**Benefit Nondiscrimination Rules**

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### Benefit Nondiscrimination Rules BC

**Common Question:** Can the employer differ \_\_\_\_\_ between classes of employees? Isn't that discriminatory?

**Answer:** Generally okay to differentiate eligibility, benefits and contributions between classes of employees so long as the employer doesn't discriminate against a protected class (e.g., age, race, religion, sex, health status)

**BUT FOR BENEFITS PROVIDED ON A TAX-FAVORED...**

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### Benefit Nondiscrimination Rules BC

- To offer benefits on a **tax-favored basis**, IRS requires plans follow benefit nondiscrimination rules
  - Benefit nondiscrimination rules restrict the ability to favor highly compensated individuals or key employees on tax-favored basis
    - Eligibility rules, waiting periods, benefits, employer contributions
  - Failure risks the highly compensated and key employees being taxed on benefits received under the discriminatory plan

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### Highly Compensated BC

- §125**
  - Officers
  - >5% shareholders if also employees
  - Highly compensated (2023 - \$135,000 in 2022; 2024 - \$150,000 in 2023)\*
- §129**
  - >5% shareholders if also employees
  - Highly compensated (2023 - \$135,000 in 2022; 2024 - \$150,000 in 2023)\*
- §105(h)**
  - 5 highest paid officers
  - >10% shareholders if also employees
  - Top 25% highest-paid employees

\*For §125 and §129, employers can make a top-paid election, choosing instead to count the top-paid 20% as highly compensated rather than using the compensation threshold

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**Key Employees** BC

- **§125 and §79**
  - Officers with annual compensation in excess of
    - **2023** - \$200,000 in 2022
    - **2024** - \$215,000 in 2023
  - >5% owners if also employees
  - >1% owners with annual compensation in excess of \$150,000

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**Discrimination Testing - Timing** BC

- **No Clear Penalty for Failure to Test**
  - §125 and §129 tests must be passed as of the last day of the plan year
  - §105(h) and §79 tests must be passed on all days during the plan year
  - If audited, must show the plan met nondiscrimination requirements

Conservative approach	Practical approach
<ul style="list-style-type: none"> <li>• Test at least annually</li> <li>• Testing in the first half of the year leaves time to make corrections if needed</li> </ul>	<ul style="list-style-type: none"> <li>• Run tests initially, but if plans pass, test again when there are significant changes in structure or participation</li> </ul>

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**Discriminatory Plans** BC

- **Consequences**
  - If plan adjustments are not before the end of the plan year, IRS could require retroactive taxation of benefits received by highly compensated and key employees (including employer payroll taxes)
- **Possible Corrections**
  - Exclude HCs or keys from participating, or from participating on a tax-favored basis (i.e., employee contributions after-tax, impute income for employer's contribution)
  - Limit amounts elected by HCs or keys on a tax-favored basis
  - Adjust eligibility rules to include additional non-HCs

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# Benefits for Owners & Independent Contractors



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## Benefits for Owners BC

- Who is an "Owner"?
  - Sole Proprietor
  - Partner in a Partnership
  - >2% S-Corp Shareholder
  - C-Corp Shareholder\*

Spouses, children, grandchildren and parents

\*Dual status as employee and owner permitted only for a C-Corp shareholder

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## Benefits for Owners & Independent Contractors BC

- Plan Eligibility
  - May be necessary to specifically include owners and/or independent contractors
    - Make sure to get carrier (or stop-loss vendor) approval
    - Keep in mind that offering benefits to independent contractors is a factor that will be considered in determining status as independent contractor versus employee
- Employer Mandate & Employer Reporting
  - Do not count toward applicable large employer status
  - No requirement to offer coverage
  - No reporting required unless enrolled in a self-funded medical plan
- Nondiscrimination Rules
  - Do not apply since owners cannot participate on the same tax-favored basis

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**Benefits for Owners & Independent Contractors** BC

- Taxation
 

**Cannot participate on the same tax-favored basis as employees**

- Cannot participate in a cafeteria plan
    - Premium contributions must be made after-tax
  - Cannot participate in an HRA or health FSA
  - Employer contributions treated as taxable compensation
- Other Considerations
  - Dual status C-Corp shareholders may participate on the same tax-favored basis as employees to the extent of W-2 income
  - Owners and independent contractors may contribute to an HSA if otherwise eligible
  - Owners and independent contractors disregarded for discrimination testing purposes

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**MEWAs → Coverage of Independent Contractors** BC

- Offering benefits to non-employees generally creates a multiple employer welfare arrangement (MEWA)
  - Informal DOL guidance suggests working partners can participate in employer's benefits without forming a MEWA. This exception might extend to other owners as well
  - Not aware of any exception for independent contractors
- Fully-Insured vs. Self-Funded
  - MEWA is not a problem if plan is fully-insured and carrier agrees to it
  - Self-funded MEWA is subject to state law, making it very difficult
- Form 5500 & Form M-1 Filing
  - Required for MEWAs unless independent contractors make up more than 1% of the participants on the plan

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**Benefits for Domestic Partners**

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**Domestic Partners** BC

- Do employers have to offer coverage to domestic partners?
  - Coverage NOT required by federal law
  - Some states require coverage be offered to registered domestic partners
    - Required for fully-insured plans
    - Self-funded plans generally qualify for ERISA pre-emption

While employers may not be required to offer coverage to domestic partners, more are choosing to do so to keep up with current trends, avoid discrimination claims, and to remain competitive

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**Domestic Partners** BC

- Coverage Trends
  - US Supreme Court's decision in *Obergefell v. Hodges* (2015) legalized same-sex marriage
    - Following this decision, many expected coverage for domestic partners to decrease
    - Kaiser Family Foundation surveys between 2015 and 2023 found slight increases in coverage offerings to domestic partners

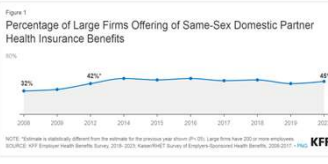


Figure 1  
Percentage of Large Firms Offering of Same-Sex Domestic Partner Health Insurance Benefits

Year	Percentage
2008	32%
2009	35%
2010	38%
2011	40%
2012	42%
2013	43%
2014	44%
2015	44%
2016	44%
2017	44%
2018	44%
2019	44%
2020	44%
2021	44%
2022	44%
2023	48%

NOTE: \*Statistically significant from the estimate for the previous year (p < .05). Large firms have 250 or more employees.  
SOURCE: KFF Employer Health Benefits Survey, 2018-2023; KaiserHFT Survey of Employer-Sponsored Health Benefits, 2008-2017. ©KFF

- Younger individuals choosing to delay marriage, but in committed relationships
- Focus on equity tied gender identity and sexual orientation *Bostock v. Clayton County* (2020)

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**Eligibility Rules** BC

**Common Eligibility Requirements**

- ✓ Age requirement (e.g., 18+)
- ✓ Currently living and have lived at the same address for XX months/years
- ✓ Joint checking or shared ownership or expenses
- ✓ Not in another marriage or domestic partnership
- ✓ Formal registration with the state
- ✗ Do NOT limit eligibility based on sex of the parties

*Fully-insured plans may have to follow state law or carrier's eligibility requirements*

- Common Practices for Attestation/Certification
  - Election form attestation (attest to meeting plan eligibility requirements)
  - State certification or registration (helps determine state taxation)
  - Require proof of shared living and expenses
  - Combination of above

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**Taxation** BC

- **Imputing Tax**
  - Must tax employee on fair market value (FMV) of the coverage for domestic partner or domestic partner's children who are not employee's tax dependents

**Step 1**

**Calculate FMV (Full Premium)**

FMV calculation possibilities:

- Single COBRA premium
- EE+SP - EE
- Family - EE

➔

**Step 2**

**Impute FMV (Full Premium)**

Treat FMV as additional taxable income to the employee

- **Mechanics**
  - Handle employee contributions after-tax and impute value of employer contributions
  - Handle employee contributions pre-tax and impute full value of cost of coverage

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**Other Compliance Considerations** BC

- Election change rules may not apply
- Cannot participate in FSAs and HRAs
- Special HSA considerations
- Life insurance beneficiaries
- HIPAA special enrollment rights
- No independent COBRA rights

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# Questions?

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