



Health Care Reform in Indian Country

Self-Governance Communication & Education

Self-Governance Tribes Striving Towards Excellence in Health Care

Update on State Efforts to Impose Individual Mandates after Effective Repeal of Federal Individual Mandate to Secure Health Insurance¹

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This brief provides to Tribes and Tribal organizations information on the status of the federal individual mandate established by the Affordable Care Act (ACA) and an update on state efforts to stabilize health insurance markets by imposing their own individual mandates. On December 22, 2017, President Trump signed into law a tax bill that effectively repealed the federal individual mandate, beginning in 2019.² However, in response to the enactment of the tax law, some states have implemented or plan to implement their own individual mandates. The brief also recommends actions to be taken by Tribal representatives with state officials.

Federal Individual Mandate

The ACA requires individuals to have health insurance coverage (minimum essential coverage) each month, or qualify for an exemption, in order to avoid a tax penalty referred to as the “shared responsibility payment” when filing their federal income tax return (*i.e.*, the individual mandate).³ The ACA does not exempt American Indians and Alaska Natives (AI/ANs) generally from the requirement to have minimum essential coverage. However, **(a) under the ACA law, AI/ANs who meet the definition of Indian,⁴ and (b) under regulations issued by the Department of Health and Human Services, those**

¹ This brief is for informational purposes only and is not intended as legal advice. For questions on this brief, please contact Doneg McDonough, TSGAC Technical Advisor, at DonegMcD@Outlook.com.

² See H.R. 1, section 11081.

³ See section 5000A of the Internal Revenue Code (Code).

⁴ Section 5000A(e)(3) of the Code provides an exemption for an individual “for any month during which the individual is a member of an Indian tribe (as defined in section 45A(c)(6)).” Section 45A(c)(6) defines “Indian tribe” 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.”

eligible for services through an Indian health care provider,⁵ including any dependents,⁶ qualify for an exemption from the shared responsibility payment (i.e., tax penalty). See Attachment A for additional information on federal law, regulations, and sub-regulatory action regarding the individual mandate.

Impact of Tax Law

The recently enacted federal tax law effectively repealed the individual mandate, beginning in 2019, but did not eliminate the individual mandate itself. Instead, the law zeroed out the shared responsibility payment for individuals who do not have minimum essential coverage.

State Efforts in Response to Effective Repeal of Federal Individual Mandate

Since the enactment of the federal tax law change, several states have implemented or plan to implement their own individual mandates to address increased premium costs in their health insurance markets. The effect of eliminating the shared responsibility payment is that fewer people are enrolling in health insurance—with those with greater-than-average health care needs more likely to remain enrolled and those with less-than-average health care needs more likely to exit the insurance market. This results in (a) fewer people to spread risk across and (b) higher average costs for those who remain in the state health insurance markets. Therefore, states feel they must create an incentive through the use of a tax penalty for individuals to have health insurance. Summaries of these efforts, as well as their impact on AI/ANs, appear in Attachment B.

Most, but not all, of these state individual mandates impose a penalty for not having qualifying health insurance coverage similar to the shared responsibility payment under the ACA. With regard to Indian-specific exemptions from having to pay a shared responsibility payment, the state efforts are mixed, with some states solely exempting enrolled Tribal members. Other states—with comprehensive AI/AN protections—reference federal regulations to identify which exemptions apply, including an exemption from the individual responsibility payment for IHS-eligible individuals, including any dependents.

Recommendation

The Tribal Self-Governance Advisory Committee (TSGAC) to the Indian Health Service (IHS) recommends that state legislatures, state insurance commissioners, and the National Association of Insurance

⁵ Federal regulations at 45 CFR 155.605(e)(3) stipulate that the “IRS may allow an applicant to claim the exemption specified in HHS Guidance published September 18, 2014, entitled, ‘Shared Responsibility Guidance—Exemption for Individuals Eligible for Services through an Indian Health Care Provider,’ and in IRS Notice 2014-76, section E.” Notice 2014-76 specifies that an “individual is eligible for a hardship exemption if the individual is eligible for services through an Indian health care provider (as defined in 42 CFR 447.50) or is eligible for services through Indian Health Service in accordance with 25 U.S.C. 1680c(a), (b), or (d)(3).” Regulations at 42 CFR 447.50 define “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).” Under 25 U.S.C. 1680c, individuals eligible for services through the IHS include 1) “[a]ny spouse of an eligible Indian who is not an Indian, or who is of Indian descent but is not otherwise eligible for the health services provided by [the IHS], ... if all such spouses or spouses who are married to members of each Indian tribe being served are made eligible, as a class, by an appropriate resolution of the governing body of the Indian tribe or tribal organization providing such services” and 2) “non-Indian women pregnant with an eligible Indian’s child for the duration of the pregnancy through postpartum.”

⁶ “Dependent” is defined as a child who will not turn 19 (or a student who will not turn 24) during the taxable year. See 26 U.S.C. 152.

Commissioners (NAIC), when developing legislation to establish an individual mandate for health insurance, ensure that this legislation and any subsequent regulations mirror federal exemptions for AI/ANs. Under federal regulations, an AI/AN is exempt from a tax penalty if the individual is a member of an Indian Tribe or if the individual is eligible for services through an Indian health care provider (as defined in 42 CFR 447.50) or is eligible for services through the IHS in accordance with 25 U.S.C. 1680c(a), (b), or (d)(3). In effect, federal regulations treat eligibility for IHS services as having minimum essential coverage.⁷ Implementing this recommendation will avoid imposition of tax penalties on IHS-eligible individuals and will avoid the potential for creating conflicting federal and state policy.

⁷ Likewise, federal regulations identify eligibility for IHS services as “creditable coverage” for the purpose of avoiding a penalty for late enrollment in Medicare Part D. See 42 CFR 423.56(b)(9).

Attachment A

Table A: Federal Law, Regulations, and Sub-Regulatory Action Regarding the Individual Shared Responsibility Payment (Individual Mandate) and Related Indian-Specific Exemptions			
Federal Law, Regulation, Sub-Regulatory Action	Effective Year	Description of Individual Mandate Coverage Requirement and Penalty	Description of Indian-Specific Exemptions
Affordable Care Act (ACA) ¹	2010	Requires individuals to maintain minimum essential coverage, obtain an exemption, or pay a penalty equal to the greater of: (1) a percentage of household income, with a cap at the national average premium for the bronze plan available through the Marketplace that provides coverage for the applicable family size involved, or (2) a flat dollar amount, with a maximum flat amount per family of three times the specified amount for an adult	Specifies an exemption from the penalty for Tribal members; allows the HHS secretary to establish exemptions for additional populations
IRS regulation ²	2010	Implements the coverage requirement and penalty discussed above	Implements the exemptions discussed above
CMS regulation ³	2013	Establishes requirements for Marketplace determination of eligibility for exemptions from the coverage requirement	Establishes an exemption from the penalty for other IHS-eligible individuals
Sub-regulatory CMS/IRS guidance ⁴	2014	Makes no changes to the coverage requirement or penalty	Specifies other IHS-eligible individuals can claim an exemption from the penalty through the federal tax filing process
Recently enacted tax legislation ⁵	2017	Makes no changes to the coverage requirement but reduces the amount of the penalty to \$0	Makes no changes to the Indian-specific exemptions

Notes:

¹ See ACA, sections 1501(b) and 1311(d)(4)(H).

² See 26 U.S.C. 5000A, with exemption for Tribal members addressed at 26 U.S.C. 5000A(e)(3).

³ See 45 CFR 155, subpart G, with exemption for other IHS-eligible individuals addressed at 45 CFR 155.605(e)(3).

⁴ See the CMS guidance titled "Shared Responsibility Guidance—Exemption for Individuals Eligible for Services Through an Indian Health Care Provider" and dated September 18, 2014, at <https://www.cms.gov/CCIIO/Resources/Fact-Sheets-and-FAQs/Downloads/guidance-exemption-certain-AIAN.pdf>. See also IRS Notice 2014-76, section E at <https://www.irs.gov/pub/irs-drop/n-14-76.pdf>.

⁵ See H.R. 1 (P.L. 115-97), section 11081.

Attachment B

Table B: States with Enacted Individual Shared Responsibility Payment Requirements (Individual Mandates) and Related Indian-Specific Exemptions (as of July 2019)					
State	Effective Year	Description of Individual Mandate Penalty ¹	Indian-Specific Exemptions		Description of Indian-Specific Exemptions
			Tribal Members	Other IHS-Eligible Individuals	
California	2020	Institutes a penalty similar to the ACA penalty	Yes	No	Specifies an exemption from the penalty for Tribal members (including any dependents) but not other IHS-eligible individuals ²
District of Columbia	2019	Reinstates the ACA penalty with a maximum penalty equivalent to the cost of the average annual bronze plan premium	Yes	Uncertain	Does not specify an exemption from the penalty for Tribal members or other IHS-eligible individuals; an exemption for Tribal members (including any dependents) applies through incorporation of federal regulations, but an exemption for other IHS-eligible individuals might not apply ³
Massachusetts	2007 (pre-ACA)	Institutes penalties of: --For individuals with an income of 150%-300% FPL, half of the lowest-cost Marketplace plan premium --For individuals with an income of 300%+ FPL, half of the lowest-cost bronze plan premium	Yes	Yes	Specifies individuals enrolled in a "tribal or Indian Health Service plan" meet the state coverage requirement (minimum creditable coverage) ⁴
New Jersey	2019	Reinstates the ACA penalty with a maximum penalty equivalent to the cost of the average annual bronze plan premium	Yes	Yes	Does not specify an exemption for Tribal members or other IHS-eligible individuals; exemptions for both populations (including any dependents) apply through incorporation of federal regulations/guidance ⁵
Rhode Island	2020	Reinstates the ACA penalty with a maximum penalty equivalent to the cost of the average annual bronze plan premium	Uncertain	Uncertain	Does not specify an exemption from the penalty for Tribal members or other IHS-eligible individuals; exemptions for both populations (including any dependents) might apply through incorporation of federal regulations/guidance ⁶
Vermont	2020	Institutes no penalty (only reporting requirements)	No	No	Does not specify an exemption from the penalty for Tribal members or other IHS-eligible individuals ⁷

Notes:

¹ Descriptions of individual mandate penalties were taken from the Kaiser Family Foundation report titled "State Actions to Improve the Affordability of Health Insurance in the Individual Market" and dated July 17, 2019.

² See SB 78, section 100705(c)(5) at https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201920200SB78.

³ See Code of the District of Columbia, chapter 51, § 47-5102 at <https://code.dccouncil.us/dc/council/code/titles/47/chapters/51/>. The regulations stipulate that the "exemptions available from the federal requirement to maintain minimum essential coverage under section 5000A of the Internal Revenue Code of 1986 (26 U.S.C. § 5000A) and its implementing regulations, as such section and its implementing regulations were in effect on December 15, 2017, shall also be available as exemptions." However, it is uncertain whether this incorporation of federal regulations includes an exemption for other IHS-eligible individuals. The DC Health Link Web site indicates that Tribal members (but not other IHS-eligible individuals) qualify for an exemption to the District of Columbia individual mandate. See <https://dhealthlink.com/individual-responsibility-requirement#exemption>. Also, see the New Jersey approach below.

⁴ See the Mass.gov "Health care reform for individuals" page at <https://www.mass.gov/info-details/health-care-reform-for-individuals>.

⁵ See A 3380, section 6(a) at https://www.njleg.state.nj.us/2018/Bills/A3500/3380_11.PDF. The law stipulates: "Except as otherwise provided in this section, any federal regulations implementing 26 U.S.C. s.5000A, as that section and those regulations are in effect on December 15, 2017, shall apply as though incorporated into this act. Federal guidance interpreting these federal regulations shall similarly apply." The New Jersey Department of Treasury Web site confirms that Tribal members and other IHS-eligible individuals qualify for an exemption from the state individual mandate. See <https://nj.gov/treasury/njhealthinsurancemandate/exemptions.shtml>.

⁶ See H 5151, section 44-30-101(h) at <https://legiscan.com/RI/text/H5151/id/2038891>. The law stipulates: "The Shared Responsibility Payment Penalty shall be assessed and collected as set forth in this chapter and, where applicable, consistent with regulations promulgated by the federal government, the exchange and/or the tax administrator. Any federal regulation implementing section 5000A of the Internal Revenue Code of 1986, as amended, and in effect on the 15th day of December 2017, shall apply as though incorporated into the Rhode Island Code of Regulations. Federal guidance interpreting these federal regulations shall similarly apply." It is uncertain whether this incorporation of federal regulations and related subregulatory guidance confers exemptions from the Rhode Island individual mandate to Tribal members and other IHS-eligible individuals.

⁷ See H 524 at <https://legislature.vermont.gov/Documents/2020/Docs/ACTS/ACT063/ACT063%20As%20Enacted.pdf>.