

Frequently Asked Questions

Certain Provisions of the Affordable Care Act (“ACA”) And Compliance with the Fringe Benefit Requirements of the Service Contract Act (“SCA”), Davis-Bacon Act (“DBA”), and Davis-Bacon Related Acts (“Related Acts”)

1. What are the employer shared responsibility provisions and which employers are subject to them?

The ACA added the employer shared responsibility provisions to the Internal Revenue Code. Generally, under these provisions, certain employers must either offer their full-time employees and their dependents health coverage that is affordable and that provides minimum value, or, alternatively, make a payment to the IRS if they do not offer that coverage and at least one full-time employee purchases a qualified health plan on an Affordable Insurance Exchange (“Exchange”) and receives the premium tax credit.

The employer shared responsibility provisions apply to applicable large employers (“ALEs”), which are employers with an average of at least 50 full-time employees (including full-time equivalent employees) during the previous year. The employer shared responsibility provisions first applied in 2015, but transition relief from certain requirements was available for 2015. Under one form of transition relief, an ALE with fewer than 100 full-time employees (including full-time-equivalent employees) in 2014 is not subject to the employer shared responsibility provisions for 2015, provided certain conditions are met regarding the employer’s maintenance of workforce and pre-existing health coverage. For an employer with a non-calendar year plan year, this relief extends to the months in 2016 that are part of the 2015 plan year.

For purposes of the employer shared responsibility provisions, a full-time employee is, for a calendar month, an employee employed on average at least 30 hours of service per week, or 130 hours of service per month. An ALE does not need to offer coverage to part-time employees in order to avoid an employer shared responsibility payment.

For purposes of the employer shared responsibility provisions, a dependent is an employee’s child (including a child who has been legally adopted or placed for adoption) who has not reached the age of 26. For this purpose, spouses are not considered dependents, and neither are stepchildren or foster children.

2. What are the fringe benefit requirements of the SCA, DBA, and Related Acts and how do they relate to the ACA’s employer shared responsibility provisions?

The SCA and the DBA generally require the payment of prevailing wages and fringe benefits to workers employed on federal service contracts over \$2,500 or federal construction contracts over \$2,000. The Related Acts extend the DBA’s prevailing wage and fringe benefit requirements to construction projects that are assisted by Federal agencies through grants, loans, loan guarantees, insurance and other methods.

The DBA and Related Acts (collectively, “DBRAs”), the SCA, and the ACA, including the employer shared responsibility provisions, are separate, independent laws. Employers subject to the ACA, including the employer shared responsibility provisions, and the SCA or DBRAs are required to

comply with each. The ACA does not alter the statutory or regulatory requirements of the SCA or DBRAs.

Numerous types of benefit programs (*e.g.*, health coverage, pension and retirement plans, life insurance) will qualify as fringe benefits under the SCA or DBRAs as long as they are “bona fide” plans. Employers can also satisfy their fringe benefits requirements under the SCA and DBRAs by paying covered employees the cash equivalent of the fringe benefits specified in the applicable wage determination.

The Department of Labor’s Wage and Hour Division (“WHD”) generally anticipates that eligible employer-sponsored plans, as defined under the ACA, will be bona fide under the SCA or DBRAs. However, SCA and DBRA employers who are ALEs and wish to avoid being liable for an employer shared responsibility payment must separately determine whether an offer of coverage under their bona fide health plan is sufficient to avoid a potential employer shared responsibility payment, including whether the coverage is affordable and provides minimum value within the meaning of the employer shared responsibility provisions. Employers with questions about whether a plan is bona fide should direct any inquiries to the Department of Labor’s Wage and Hour Division. For more information about the employer shared responsibility provisions, employers should review the information at <http://www.irs.gov/Affordable-Care-Act/Employers/Employer-Shared-Responsibility-Provisions>.

3. Will employers subject to the ACA’s employer shared responsibility provisions receive SCA and DBRA credit for health coverage contributions they make for employees who are covered by the SCA and DBRAs?

Yes. While employers cannot receive credit toward their SCA or DBRA obligations for any benefits that they are required to provide under any federal, state or local law, such as employer contributions to social security or workers’ compensation, WHD has concluded that the health benefits provided by employers that are subject to the employer shared responsibility provisions are not benefits required by law within the meaning of the SCA and DBRAs. No employer is required by the employer shared responsibility provisions to offer health coverage for employees; rather, ALEs have a choice of either offering full-time employees (and their dependents) health coverage that is affordable and provides minimum value or, alternatively, not offering this coverage and making a payment to the IRS if at least one full-time employee purchases a qualified health plan on an Exchange and receives the premium tax credit. As a result, WHD will permit ALEs (along with non-ALEs) to credit their contributions to employee health coverage toward the satisfaction of SCA or DBRA obligations.

4. Can an employer receive SCA and DBRA credit for the cost of making employer shared responsibility payments to the IRS?

No. Employers that are liable for these payments to the IRS cannot credit the cost of the payments toward their SCA or DBRA obligations. These payments are not fringe benefits and do not benefit employees.

5. May employees who are covered by the SCA or DBRAs decline employer-provided health coverage?

Generally, no. Because it is the responsibility of a contractor to satisfy its fringe benefit obligations under the SCA or DBRAs, these laws permit the contractor to choose the fringe benefits to be provided, whether or not the employees prefer the chosen benefits, different benefits, or cash. Thus, under the SCA and DBRAs, an employer may choose to provide all employees with health coverage,

even if some or all of its employees prefer to receive the benefit in cash or different benefits, and even if some or all of the employees have another source of health coverage. Under the ACA employer shared responsibility provisions, employees likewise need not be given an opportunity to decline health coverage if the coverage that an ALE offers provides minimum value and costs no more than 9.5 percent (as adjusted annually) of the federal poverty line (determined on a monthly basis). However, if the coverage offered by an ALE to a full-time employee does not provide minimum value or costs the employee more than that amount, then an ALE is not treated as having made an offer of coverage unless the employee has an effective opportunity to decline to enroll.

Regardless of whether the employer is an ALE, under the SCA and DBRAs, if employees desire cash payments or benefits other than those chosen by the contractor, that would be a matter for discussion and resolution between the employees or their authorized representative and the employer. The Department of the Treasury and the Internal Revenue Service have recently issued additional guidance regarding questions that have arisen regarding the treatment under various ACA provisions, including the employer shared responsibility provisions, of amounts that may be used either for employer-provided health coverage, or for non-health benefits (or received in cash) in this context.¹

6. If employees covered by the SCA or DBRAs decline an offer of coverage, must their employer still furnish SCA or DBRA fringe benefits to those employees?

Yes. The DBRA and SCA require that wages and fringe benefits be furnished to employees; merely offering benefits, but ultimately not providing them, does not suffice.

7. Can an employer receive SCA or DBRA credit for the full cost of employer-provided health coverage?

As noted in FAQ 3, the cost of employer-provided health coverage is generally creditable toward an employer's SCA or DBRA obligations. Whether the full cost will be creditable will depend on several factors.

Under the DBRAs, the basic hourly wage and fringe benefit components of a wage determination constitute the prevailing wage and are interchangeable. Thus, a DBRA employer that purchases or pays for health coverage for its employees may credit the cost of the coverage toward either the wage or fringe benefit obligation, or a combination of the two. This is the case even if the cost of the coverage exceeds the fringe benefit amount listed in the DBRA wage determination, or even if the wage determination lists no fringe benefits at all. Because of this flexibility, employers will generally be able to credit the full cost of health plans and/or other benefit plans toward their DBRA obligations, assuming the plans are also bona fide under DBRA criteria and the amount credited reflects the actual costs to the employer. Importantly, however, the employer must also ensure that it remains in compliance with any applicable minimum wage obligations, including [the Fair Labor Standards Act](#) and [Executive Order 13658, Establishing a Minimum Wage for Contractors](#). These minimum wage obligations may not be satisfied using health coverage or other fringe benefits.

In contrast, wages and fringe benefits are separate statutory requirements under the SCA. Thus, employer contributions to benefits cannot be used to reduce the cash wages due to employees. For

¹ See Minimum Essential Coverage and Other Rules Regarding the Shared Responsibility Payment for Individuals, 79 Fed. Reg. 70464 (Nov. 26, 2014); Minimum Value of Eligible Employer-Sponsored Plans and Other Rules Regarding the Health Insurance Premium Tax Credit, 80 Fed. Reg. 78971 (Dec. 18, 2015); Notice 2015-87, 2015-52 I.R.B. 889.

example, if an SCA wage determination requires an employer to pay certain employees \$10.63 per hour in cash wages and \$4.27 per hour in fringe benefits, and the employer purchases for these employees a health insurance plan, or any benefit plan, that costs \$5.27/hour per employee, the employer cannot reduce the employee's cash wage by \$1.00/hour by crediting the additional \$1.00/hour spent on fringe benefits toward the employee's cash wages. Neither can the employer compel employees to contribute the additional \$1.00 per hour from their hourly cash wages without the employees' consent. Without employee consent, a required contribution of this type would impermissibly bring an employee's cash wages below the \$10.63 per hour specified in the wage determination and would be prohibited.

8. How does ACA per-member rating impact SCA and DBRA requirements?

Under the ACA, "composite rating" generally is no longer permitted in the small group market (employers with 1-50 employees, subject to state flexibility to expand to include employers with 1-100 employees). Insurers using this rating system used the characteristics of a group as a whole to determine an average premium per employee. Now, insurers offering non-grandfathered small group market coverage subject to the community rating rules under the ACA must use "per-member" rating, under which premium rates are calculated individually for each employee based on as many as four factors: family size, geography, age and tobacco use (within specified limits). After calculating the total group premium using this rating method, insurers can then charge premiums based on average employee premium amounts (composite premiums), provided that the average is derived using the total of all per-member premiums calculated at the time of applicable enrollment at the beginning of the plan year.

Under the DBRAs and, in most cases, the SCA, fringe benefit contribution amounts must reflect the actual cost to the employer of the benefit(s) provided for the employee on whose behalf the contribution is made. An employer that contributes to a health insurance plan to comply with its SCA or DBRA obligations must ensure that it takes credit for no more than the premiums charged to the employer by the insurer for each employee at issue. If an employer in the small group market chooses an insurance plan that does not offer composite premiums, but only individualized premiums on a per-member basis, then the amount of permissible SCA or DBRA credit will vary from employee to employee.

However, WHD anticipates that many insurers will offer plans that charge composite, or average, premiums. An insurer using this method first calculates rates on a per-member basis. The individual rates are added and then divided by the total number of employees to determine the average, or composite, premium that is charged to the employer for each employee. In such a case, the employer will be permitted to take the composite amount of SCA or DBRA credit for each employee, because even though the composite premium is derived from different per-member rates, it reflects the cost that the insurer is charging the employer to insure each employee.

For plan years beginning on or after January 1, 2015, insurers offering non-grandfathered plans in the small group market subject to the community rating rules under the ACA that charge composite premiums must divide covered individuals into two groups, or "tiers," for compositing purposes – individuals under age 21 and individuals age 21 and over (unless a state has established and the Centers for Medicare & Medicaid Services has approved an [alternate composite methodology](#) to be used in the state). Additionally, insurers using tobacco use as a rating characteristic may only apply it on a per-member basis after the composite premium is calculated and as otherwise permitted by the regulations.

These factors may affect the amount of SCA or DBRA credit per employee an employer will be permitted to take for health insurance contributions. In general, employers may take SCA or DBRA credit only for the amount of the premium that the insurance issuer charges the employer for each employee. Employers should ensure that the amount of SCA or DBRA credit taken for each employee does not exceed the cost of that employee's insurance as charged by the issuer.