Tribal Government Extension Request from the Employer Shared Responsibility Mandate:
The Affordable Care Act (ACA) has imposed requirements for Applicable Large Employers (ALEs) to both offer full-time employees and their dependents certain minimum levels of health coverage, regardless if the employee is eligible for services through the Indian Health Service (IHS), tribal programs, or urban Indian programs or qualifies for the individual Indian health exemption. The ACA imposes a one-size-fits-all standard intended for corporations that disregards the federal government’s trust responsibility to provide medical and public health services to members of federally recognized tribes and Alaska Natives.

Tribal employees that have access to Indian Health Service programs should be exempt from the employer shared responsibility mandate. Requiring tribal governments to provide these employees with health insurance or face large penalties is a direct conflict with the federal government’s trust responsibility.

Additionally, proper ACA planning and implementation at tribal governments hinge on employer aggregation rules. Tribal governments often own special purpose entities such as health care facilities, schools, nursing homes, and other enterprises under the umbrella of the tribe. Every employer, large and small, is responsible for determining the measures under the ACA for which they are accountable. The Department of Treasury has not issued guidance on how the employer aggregation rules apply to tribal governments and their related entities. The lack of clear definitions regarding entity relationships and, thus, who is ultimately responsible for the ACA employer mandate penalty, further complicates the issue.

An extension of transition relief from the employer shared responsibility for the information reporting until guidance is released will allow tribal governments and the Department of Treasury time to clarify the applicability of the ACA.
Key Areas of Concern Impacting Tribal Governments:

- Requiring tribes to provide insurance to their employees that have access to IHS and who are otherwise exempt from the individual mandate is a direct conflict to the federal government’s trust obligation.

- Applying the general concepts on the determination of "collective full-time employees" (§ 4980H) to typical tribal scenarios is a challenge and creates diversity in practice. The determination is central to the employer shared responsibility, which may or may not include all entities related to the tribe. Increasingly tribes are also invested in businesses through joint venture arrangements with other tribes or with corporations or individuals. In the absence of definitive guidance, some tribes have adopted a policy to include all entities to avoid tax penalties, while others are applying the employer shared responsibility mandate per separate legal entity that has its own employer identification number.

- The employer shared responsibility mandate creates an administrative hardship, especially for small tribes that employ less than 50 employees but have enterprises with significantly more employees.

- Compliance for both employee coverage calculations and information reporting requires considerable planning and execution across tribal departments. Often separate tribal entities have their own human resource departments with different payroll software capabilities.

- The ACA encouraged employers to purchase costly software platforms to alleviate the administrative burden. However, many payroll software companies have not implemented programs to comply with the ACA in a timely matter. Multiple versions of the information reporting were released this past year through one top payroll software system resulting in incorrect data. Software bugs will have tax consequences as penalties for not complying with the ACA are the responsibility of the tribal government and not the payroll software company.

- There is no clear guidance on the applicability of the employer shared mandate on when to provide coverage for seasonal or part-time employees that move jobs between tribal entities to full-time at another entity.

- While the IRS has not provided guidance on how the employer aggregation rules apply to tribal governments, penalties are still in play. According to the law, if the minimum essential coverage is not offered to employees, even if all employees have access to IHS or tribal health programs, and at least one employee goes to the marketplace for insurance and receives a premium tax credit, a $2,000 annual penalty is assessed on a monthly basis for each employee over 30 (2016 rules). In addition, there are penalties for errors in the information reporting that range from $100 to $250 per violation per form. This is a steep price to pay for uncertainty.

Example: Tribal Entity, Inc. does not offer the minimum essential coverage and has 100 employees where 95% have access to Indian health programs and qualify for the individual Indian health coverage exemption. An employee was recruited at an event to sign up on the marketplace for...
insurance. If that employee receives a premium tax credit, the penalty to Tribal Entity, Inc. will be $140,000.

**Employee Over 30 Calculation:** 100 employees – 30 = 70 employees  
**Penalty:** 70 employees x $2,000 annual penalty per employee = $140,000

The ACA exists to improve American’s health and overall well-being. No one-size-fits-all federal policy can accomplish this goal. Beneficial reform that considers the federal government’s trust responsibility to provide medical care and the uniqueness of tribal workforce structures will thus improve those outcomes, increasing healthcare’s quality and lowering its cost to tribal governments.

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