

ACA OVERVIEW

Provided by Touchstone Consulting Group

Impact of the ACA in U.S. Territories

The Affordable Care Act (ACA) makes significant changes to the U.S. health care system, including new coverage requirements, patient protections and cost limitations.

Because of their unique legal structure, a number of questions have arisen regarding how the ACA applies and is enforced in the U.S. territories. As a result, the Department of Health and Human Services (HHS) has issued some guidance addressing whether various ACA provisions apply to the territories and to what extent.

This ACA Overview provides a summary of the application of certain ACA provisions in the U.S. territories.

LINKS AND RESOURCES

- On July 16, 2014, the Department of Health and Human Services (HHS) issued identical letters regarding the applicability of the ACA's market reform requirements to health insurance issuers in [Puerto Rico](#), [Guam](#), [Northern Mariana Islands](#), [the U.S. Virgin Islands](#) and [American Samoa](#).
- On Dec. 10, 2012, HHS issued a [letter](#) to the governors of the U.S. territories addressing the application of the Exchanges and other related ACA tax provisions to the territories.

This ACA Overview is not intended to be exhaustive nor should any discussion or opinions be construed as legal advice. Readers should contact legal counsel for legal advice.

HIGHLIGHTS

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- None of the U.S. territories have established an Exchange.
- Health insurance issuers in the U.S. territories are exempt from many of the ACA's market reforms.
- Some of the market reforms still apply to employer-sponsored group health plans sold in the territories.
- The employer shared responsibility rules do not apply in most U.S. territories, although some territories must individually determine whether these rules would be mirrored in their own tax codes.
- The ACA includes an explicit exemption from the individual mandate penalty for bona fide residents of U.S. territories.

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The U.S. territories are subnational regions that are regulated by the U.S. federal government. Territories are distinct from U.S. states, which share sovereignty with the federal government. Currently, there are five inhabited U.S. territories:

1. Puerto Rico
2. Guam
3. Northern Mariana Islands
4. The U.S. Virgin Islands
5. American Samoa

Although these territories are legally part of the United States, they are self-governing and have locally elected governors and territorial legislatures, in addition to a non-voting delegate in the U.S. House of Representatives. Citizens of the U.S. territories are considered U.S. citizens, but cannot vote in federal elections. In addition, only some of the U.S. Constitution's protections apply in the territories.

IMPACT OF THE ACA

The territories have their own tax laws; therefore, they must generally determine how those laws apply. However, in a letter to the governors of U.S. territories, HHS offers general observations with respect to certain ACA tax provisions, in consultation with the IRS. According to HHS, the applicability of a tax provision depends on whether a territory's tax laws mirror the federal Internal Revenue Code (Code).

- **Non-mirror Territories (Puerto Rico and American Samoa):** In a territory that has a distinct tax code, rather than a tax code that mirrors the federal Code, in general, the federal Code provisions do not apply unless the territory chooses to enact a comparable provision.
- **Mirror Territories (Guam, Northern Mariana Islands and the U.S. Virgin Islands):** In a territory that has a mirrored tax code (that is, a tax code with income tax provisions that are generally identical to those in the federal Code), the federal Code provisions generally do apply. However, mirror territories are generally not obligated to mirror excise tax provisions.

Health Insurance Exchanges

The ACA requires each state to have a competitive marketplace—known as an Exchange or Marketplace—for individuals and small businesses to purchase private health insurance. The ACA allows the U.S. territories to establish an Exchange, but HHS will not establish a federally-facilitated Exchange (FFE) in territories that elect not to establish their own Exchange.

In addition, the following programs are not applicable to territories under the ACA:

- The Consumer Operated and Oriented Plan (CO-OP) program;
- The Basic Health Program (BHP);
- The state innovation waiver; and
- The Multi-state Plan program.

A territory that elects to establish an Exchange must have notified HHS of its election by Oct. 1, 2013, and would receive funding to provide premium and cost-sharing assistance to residents who obtain health insurance through the territory's Exchange. Territories that elect not to establish an Exchange will receive increased Medicaid funding.

Although four of the five U.S. territories applied for and received grant awards in 2011 to establish Exchanges, none have created an Exchange in their territories at this time.

Insurance Market Reforms

The ACA added certain market reforms to the Public Health Service Act (PHS Act) that apply to group health plans, beginning in 2014. Originally, these market reform requirements applied to issuers in the U.S. territories due to the definition of "state" that was used in the PHS Act. However, representatives of the territories informed HHS that the ACA's market reforms were undermining the stability of the territories' health insurance markets.

As a result, in identical letters to the insurance commissioners of the five U.S. territories, HHS clarified that the following ACA market reforms do not apply to individual or group health insurance issuers in the territories:

- Guaranteed availability of coverage;
- Community rating;
- Single risk pool requirement;
- Rate review;
- Medical loss ratio (MLR) requirement; and
- Essential health benefits (EHB) requirement.

However, other ACA market reforms continue to apply to employer-sponsored group health plans (whether insured or self-insured) in the U.S. territories. Therefore, group health plans sold in the territories must still comply with the following market reforms:

- The prohibition on lifetime and annual limits;
- The prohibition on rescissions;
- Coverage of preventive health services; and
- The revised internal and external appeals process.

HHS intends to issue regulations to affirm this interpretation and clarify any inconsistent existing rules. Until final regulations are issued, issuers in the U.S. territories can rely on this interpretation.

Employer Shared Responsibility Rules

Beginning in 2015, the ACA requires applicable large employers (ALEs) to offer affordable, minimum value health coverage to their full-time employees (and dependents) or pay a penalty. This employer mandate is also known as the “employer shared responsibility” or “pay or play” rules.

In general, the employer shared responsibility rules would not apply in either mirror or non-mirror territories, unless the territory chose to enact a comparable provision under its own laws. The employer shared responsibility penalty is categorized as an excise tax, and territories with a mirror code are generally not obligated to mirror excise tax provisions. However, HHS notes that each territory with a mirror code must determine on its own whether the ACA’s employer shared responsibility rules would be mirrored in the territory’s own tax code.

Employers with Employees in U.S. Territories

Additional issues arise for U.S. employers that have employees in U.S. territories. Generally, an employee’s residency or citizenship status is not taken into account when applying the employer shared responsibility rules. However, for purposes of these rules, an employee’s “hours of service” do not include hours for which an employee receives compensation that is taxed as income from sources outside the United States (foreign source income). For this purpose, the term “United States” includes only the 50 states and the District of Columbia—it does not include the U.S. territories.

Thus, for purposes of determining hours of service of employees under these rules, an employer generally will take into account only hours for which an employee receives compensation that is taxed as income from U.S. sources. If compensation for hours of service is from sources in a U.S. territory, those hours of service should not be included in an employee’s hours of service.

Individual Mandate

Beginning in 2014, the ACA requires most individuals to obtain acceptable health insurance coverage for themselves and their family members or pay a penalty. This rule is often referred to as the “individual mandate.” Individuals may be eligible for an exemption from the penalty in certain circumstances.

The ACA includes an explicit exemption from the individual mandate penalty for:

- U.S. citizens who reside outside of the United States; and
- Bona fide residents of the U.S. territories.

Under this exemption, a bona fide resident of a U.S. territory is treated as having minimum essential coverage for each month in which the individual resides in the U.S. territory.

Reinsurance Fees

For 2014 through 2016, the ACA requires contributing entities to pay fees to support the reinsurance program, based on the number of covered lives in a state. For this purpose, the ACA defines “state” as one of the 50 states and the District of Columbia. As a result, contributing entities are not required to include covered lives in the U.S. territories when calculating reinsurance fees. In addition, reinsurance contributions are not required to the extent that the coverage applies to individuals with a primary residence in a U.S. territory that does not operate a transitional reinsurance program.

Patient-centered Outcomes Research Institute (PCORI) Fee

The ACA also requires health insurance issuers and sponsors of self-insured health plans to pay PCORI fees to fund comparative effectiveness research. The PCORI fee applies to health insurance policies and self-insured health plans issued to individuals residing in the United States, including the U.S. territories. As a result, issuers and plan sponsors must include covered lives in the U.S. territories when calculating the PCORI fee.