Sibson Consulting

update

Compliance News for Plan Sponsors

February 9, 2016

New Affordable Care Act Rules Affect Flex Credits, Opt-Outs and Health Reimbursement Arrangements

The Treasury Department and the Internal Revenue Service (IRS) recently issued guidance that will affect how employers structure benefit programs that offer "flex credits" to help employees purchase benefits or that offer taxable opt-out payments when employees decline group health coverage.[1] The rules affect when premiums are considered "affordable" under the Affordable Care Act's employer shared responsibility penalty[2] and related reporting requirements.[3] Employers may need to revise flex credits by the effective date, generally the plan year beginning on or after January 1, 2017.

This guidance also clarifies the rules that govern how employer contributions to health reimbursement arrangements (HRAs) and premium incentives connected to wellness programs affect the premiums paid by employees for health coverage and, consequently, whether coverage is considered affordable under the Affordable Care Act. Finally, the Notice announces new amounts for the employer shared responsibility penalty.

Health Compliance News Highlights:

- New rules govern how employers calculate an employee's required premium for health coverage under the Affordable Care Act.
- Most "flex credit" and opt-out programs will need to be reviewed and redesigned during 2016.
- Employers that contribute to health reimbursement arrangements or that offered wellness programs with premium discounts should review those programs in light of these rules.

Background

Affordability of group health plan coverage is important for purposes of the Affordable Care Act's employer shared responsibility penalty and related reporting requirements (*e.g.*, how large employers complete the new IRS Form 1095-C). Large employers that do not offer affordable coverage to a full-time employee would have to pay a penalty if that full-time employee qualified for a premium assistance tax credit in an Exchange/Marketplace.

Affordability is generally determined by comparing the employee's required premium for self-only coverage against certain measures of income.[4] For example,

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[1] This guidance consists of Treasury Notice 2015-87 and a new final rule, both of which were released on December 16, 2015.

[2] For more information about the employer shared responsibility penalty, see Sibson Consulting's January 15, 2015 publications, "Identifying Full-Time Employees Under the Affordable Care Act's Employer Shared Responsibility Penalty," "Affordable Care Act's Employer Shared Responsibility Penalty Takes Effect in 2015," and "How the Affordable Care Act's Employer Penalty Applies in 2015 to Employers with Non-Calendar-Year Plans."

[3] For more information about these reporting requirements, see Sibson's October 1, 2015 *Update*, "The IRS Has Issued Final Instructions on Affordable Care Act Reporting that Clarify Key Issues for Employers."

[4] Employers are allowed to rely on certain safe harbors that compare the employee's required premium to measures of income that are known to the employer (*i.e.*, W-2 wages, the employee's rate of pay or the Federal Poverty Level (FPL) for a single individual).

using the Federal Poverty Level measurement, if an employee's required premium for self-only coverage for the lowest cost plan is more than $94.75 per month in 2016, the plan would be considered unaffordable.[5]

The New Guidance

The new guidance explains how employers must calculate an employee's required premium for self-only coverage. Under this guidance, Treasury/IRS will treat certain types of plan designs as adding additional amounts to the employee's required premium for health coverage. This means that the employee's premium cost would be higher and the coverage could potentially be deemed unaffordable under the Affordable Care Act.

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Several types of employer contributions are affected by the new guidance:

- Flex credits that are only available for health coverage may be treated as lowering the employee's premium contribution in the same manner as they are now.
- Flex credits that are also available for non-health benefits (*e.g.*, life insurance premiums or dependent care) or cash will not lower the employee's premium contribution for health coverage. A transition rule eases the impact of this guidance.[6]
- Unconditional opt-out payments to an employee (*e.g.*, payments for declining coverage under an employer's plan without having to provide proof of other coverage) adopted prior to December 16, 2015, will not increase the employee's contribution for health coverage at this time, but Treasury/IRS will be issuing additional guidance on these programs which will likely modify this rule. Public comments are requested on this issue.[7]
- Wellness incentives that comply with the requirements of the Health Insurance Portability and Accountability Act (HIPAA) and affect employee premiums are treated as lowering the employee's contribution only if the incentive relates exclusively to tobacco use. Other wellness incentives would not be treated as earned and would not lower the employee's contribution.[8]
- Employer contributions to an HRA generally do not lower the amount of the employee's required premium, unless the employee may use the HRA to pay for group health plan premiums and the same employer offers both the HRA and the group health plan.[9]

The Service Contract Act (SCA) and Davis-Bacon and Related Acts (DBRA) require federal contract workers to be paid prevailing wages and fringe benefits. Fringe benefits can be provided in a variety of ways, including cash equivalents. Employees that are offered the opportunity to enroll in a health plan, but decline, would generally receive cash or other benefits of equivalent value. The Treasury and IRS are continuing to study the relationship of the SCA and DBRA to the Affordable Care Act. For plan years beginning before January 1, 2017, employer fringe benefit payments, including flex credits, under the SCA or DBRA that are available to employees to pay for an employer-sponsored plan will be treated as reducing the employee's required

[5] This calculation uses the single Federal Poverty Level for the 48 contiguous states for 2015 ($11,770) as follows: ($11,770 ÷ 12) * 9.66% = $94.75 per month.

[6] The transition rule provides that for plan years beginning before January 1, 2017, flex contributions that can be used for non-health benefits or cash will be treated as reducing the amount of an employee's required contribution. To take advantage of this relief, the flex contribution for non-health benefits or cash cannot be adopted or substantially increased after December 16, 2015.

[7] Comments must be submitted to the IRS no later than February 18, 2016.

[8] The wellness and HRA rules are effective for 2015 and 2016.

[9] Notice 2015-87 also contains new information about HRA administration, which will be discussed in a future issue of *Update*.

contribution for that plan, but only up to the amount required to satisfy the fringe benefit payment requirement under the SCA or DBRA.

New Penalty Amounts

Notice 2015-87 announced new employer shared responsibility penalty amounts. For calendar year 2015, the employer shared responsibility penalties are $2,080 (up from $2,000) and $3,120 (up from $3,000). For calendar year 2016, the penalties are $2,160 and $3,240.

Implications for Employers

Employers that had flex credit and opt-out programs in place now do not have to make immediate changes. However, it is likely that many cafeteria plans and employee contribution programs will need to be redesigned during 2016 for the plan year starting in 2017 to assure that the employer does not inadvertently trigger an employer shared responsibility penalty because coverage was deemed "unaffordable." Moreover, any employers designing new programs for plans with mid-year plan years need to be aware of these new rules.

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Employers that offer HRAs and premium-related wellness program incentives should ensure that they are operating those programs in accordance with these and other federal rules. This may involve rethinking and redesign of wellness program incentives that are not related to tobacco use.

Questions?

For more information about how these new rules may affect your plan, please contact your Sibson consultant or the Sibson office nearest you. Sibson can be retained to work with plan sponsors and their legal counsel on compliance issues.

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