PRIORITY Alert

IRS Clarifies a Number of Health Care Reform Compliance Issues

By Tripp W. VanderWal; vanderwalt@millerjohnson.com; 616.831.1796

"It's as clear as mud." That is the frustrating answer to many employer questions related to Health Care Reform. But, with a law the size of the Affordable Care Act (ACA), there are always a number of "holes" that need to be filled with regulatory guidance. But regulatory guidance is a slow process, so it takes time to fill those holes.

Fortunately, the IRS recently released IRS Notice 2015-87, which—in 31 pages—provides additional guidance on a number of issues related to the Affordable Care Act (ACA) and other, more general, health and welfare plan compliance issues. But, as the old saying goes, "be careful what you wish for." Not all of the additional guidance contained in IRS Notice 2015-87 is favorable to employers.

Because of the length of IRS Notice 2015-87, this article provides a brief summary of the key items addressed by topic. If you have additional questions on how this guidance may affect your organization, you should contact the author or another member of the Health Care Reform Team.

Affordability

For purposes of "affordability" under Health Care Reform's "employer shared responsibility" (a/k/a "pay or play") penalty, the IRS Notice provides the following guidance:

- Unconditional opt-out payments or cash-in-lieu payments (i.e., payments for waiving coverage under the employer's group health plan) must be included in the affordability calculation.

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For example, if an employer charges $50 per month for employee-only coverage under the employer's lowest-cost group health plan providing minimum value, but the employer pays employees who waive coverage $75 per month, then the cost of that coverage—for affordability purposes—is $125 per month ($50 + $75 = $125).

Employers that adopted an opt-out arrangement on or before December 16, 2015 or offer opt-out payments in order to comply with the employer's obligation under a federal prevailing wage obligation (e.g., the Service Contract Act or the Davis-Bacon Act) may continue those arrangements until the IRS issues additional guidance regarding opt-out arrangements. The future guidance will also address whether an opt-out payment conditioned on the employee providing proof of other coverage, such as through a spouse's employer, will be treated in the same manner.

- An employer's contributions to a cafeteria plan (which are sometimes referred to as "flex credits") may be considered to reduce an employer's cost of coverage for affordability purposes, if the following requirements are satisfied: (1) the contribution is not payable to the employee in cash; (2) the contribution may be used to purchase minimum essential coverage; and (3) the contribution must be used to pay for medical care (e.g., cannot be contributed to a dependent care FSA or used to purchase group term life insurance).

  Employers that adopted a flex credit arrangement that doesn't meet these requirements on or before December 16, 2015 may also include these contributions in the affordability calculation for plan years beginning before January 1, 2017 if the flex credits are continued on substantially similar terms in 2016.

- Amounts that are newly credited to an HRA may be considered to reduce an employer's cost of coverage for affordability purposes, if the following requirements are satisfied: (1) the employee may use amounts in the HRA to pay premiums for the employer's group health plan; and (2) the amount of the employer's annual contribution to the HRA is required by the terms of the HRA or the amount is determinable to the employee within a reasonable amount of time before the employee must decide to enroll in the employer's group health plan.

Adjustments For Inflation

- Health coverage is affordable for purposes of the pay or play penalty if single coverage under the employer's lowest-cost group health plan providing minimum value doesn't exceed 9.5% of the employee's "pay," as defined under one of the three affordability safe harbors. The IRS will adjust the three affordability safe harbors (i.e., Form W-2, Rate of Pay, and Federal Poverty Level) annually for inflation. As a result, employers may use 9.56% for plan years beginning in 2015 and 9.66% for plan years beginning in 2016. The inflation adjustment applies to all situations in which an employer must rely on an affordability safe harbor for purposes of the pay or play penalty and its related reporting requirements (e.g., the multiemployer plan transition relief, qualifying offers for purposes of simplified reporting, etc.).

- The excise taxes imposed on applicable large employers that fail to satisfy the requirements under the pay or play penalty are also annually adjusted for inflation. For calendar years 2015 and 2016, the $2,000 excise tax is adjusted to $2,080 and $2,160 and the $3,000 excise tax is adjusted to $3,120 and $3,240.

Health Reimbursement Arrangements (HRAs)

- In order to be an "integrated" HRA (which is required to satisfy Health Care Reform's prohibition on annual limits), an HRA that reimburses expenses of an employee's spouse and/or dependents must require the spouse and dependents to be enrolled in the employer's group health plan that provides major medical coverage. HRAs in place as of December 16, 2015 are not required to be amended until the first day of the 2017 plan year to comply with this requirement.

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- Consistent with previous guidance, an HRA covering active employees cannot reimburse participants for the cost of premiums for health insurance policies obtained on the individual market. These HRAs may, however, reimburse premiums for health insurance policies obtained on the individual market, if the health insurance policy covers only "excepted benefits" (i.e., dental or vision insurance policies). Retiree HRAs, however, are permitted to reimburse retirees for the cost of premiums for individual health insurance policies whether obtained in the private market or on the exchange. (A retiree HRA is an HRA that covers less than two active employees.)

- Similar to HRAs, neither an employee's salary reduction contributions nor an employer's contributions to a cafeteria plan can be used to reimburse participants for the cost of premiums for health insurance obtained on the individual market.

Hours Of Service

IRS Notice 2015-87 made the following clarifications with respect to an "hour of service" for purposes of determining whether an employee is full-time:

- An "hour of service" does not include any hour for which an employee is paid (or entitled to payment) under a plan maintained solely for purposes of complying with workers' compensation, unemployment or state disability laws.

- Except for "employment break periods" by employees of educational organizations, there is no cap on the number of hours of service required to be credited to an employee for periods in which the employee is paid (or entitled to payment) but doesn't provide services to the employer (e.g., paid leave of absence).

- Payment to an employee is deemed to be made by an employer regardless of whether payment is made directly by the employer or indirectly through a trust fund, insurance carrier or other arrangement to which the employer contributes or pays premiums (i.e., short- and long-term disability plans). However, this rule does not apply to a disability plan for which the employee pays with after-tax contributions.

Medical FSA Carryovers

- With respect to medical FSAs (Flexible Spending Accounts), employers are permitted to allow employees to carry over amounts up to $500 in the employee's medical FSA from one plan year to the next. But, any carryover must be included in determining whether a participant's medical FSA is "underspent" and COBRA must be offered.

- If an employer is required to offer COBRA under a medical FSA, the employer is not permitted to include the amount of any unspent carryover from a prior year in determining the amount of the applicable COBRA premium.

- A medical FSA that allows employees to carry over amounts from one plan year to the next must also allow COBRA qualified beneficiaries that elected COBRA under the medical FSA to carry over amounts from one plan year to the next.

- Employers are permitted to place "conditions" on an employee's ability to carry over amounts under a medical FSA from one plan year to the next. For example, if an employer requires employees to make a pre-tax salary contribution to the employee's medical FSA, an employee's carryover amount may be forfeited if the employee doesn't elect to make a pre-tax salary contribution in the next year.

- Employers are permitted to limit an employee's ability to carry over amounts in a medical FSA to a maximum period. For example, an employer may limit an employee's ability to carry over amounts beyond one year. So, if an employee carried over $300 from year one to year two, but did not elect to contribute additional amounts to the medical FSA in the next plan year, the employer may require the employee to "forfeit" any unused portion of the $300 at the end of year two rather than carrying over the amount to year three.

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Employers Supporting Educational Organizations

- IRS Notice 2015-87 indicates that the IRS anticipates revising the regulations under the pay or play penalty to clarify that the special rules that only apply to "educational organizations" also apply to employees of organizations that provide services to primarily one or more educational organizations. For example, this would include third-party staffing organizations that primarily provide employees to educational organizations.

Since this article could only provide a brief summary of IRS Notice 2015-87, please contact the author or another member of the Health Care Reform Team for questions on how this guidance may affect your organization.

Did you catch these alerts we sent since the December 14 newsletter?

12-29-15

Happy New Year: Employer ACA Reporting Delayed!

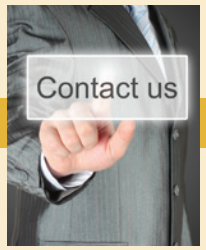
2015 Form 1094-C and copies of the 1095-Cs were required to be filed with the IRS by no later than February 29, 2016 (if mailed) or March 31, 2016 (if filed electronically). New deadlines are May 31, 2016 (if mailed) or June 30, 2016 (if filed electronically). Cheers!

12-21-15

How to Prevent Employee Questions about the New Form 1095-C

We have developed a one-page document with "frequently asked questions" that addresses the most likely questions employees will ask about Form 1095-C. Additionally, for those unanswered questions, you can direct the employee to the most appropriate individual within your organization to accurately answer those questions.

You can find these and all of our Health Care Reform newsletters on our website.



Contact Us

If you have any questions about the article in this issue, please contact the author. If you have any question on how any proposed health care reform changes will impact your organization, please feel free to contact Mary Bauman, chair of Miller Johnson's Health Care Reform Team, or another member of the team.

If you would like to reprint articles, schedule a speaker, or receive our newsletter and alerts, please send an email to healthcarereformteam@millerjohnson.com.

MILLER JOHNSON
Attorneys and Counselors

HEALTH CARE REFORM TEAM

These are some of the Miller Johnson attorneys available to answer your questions and provide assistance on issues related to Health Care Reform (Patient Protection and Affordable Care Act and the Health Care and Education Reconciliation Act):

GRAND RAPIDS
p 616.831.1700
f 616.831.1701

KALAMAZOO
p 269.226.2950
f 269.226.2951

www.millerjohnson.com

Mary V. Bauman, Chair
616.831.1704
baumanm@millerjohnson.com

Frank E. Berrodin
616.831.1769
berrodinf@millerjohnson.com

James C. Bruinsma
616.831.1708
bruinsmaj@millerjohnson.com

David M. Buday
269.226.2952
budayd@millerjohnson.com

Tony Comden
616.831.1757
comdent@millerjohnson.com

William H. Fallon
616.831.1715
fallonw@millerjohnson.com

Jeffrey J. Fraser
616.831.1756
fraserj@millerjohnson.com

Timothy C. Gutwald
616.831.1727
gutwaldt@millerjohnson.com

Richard E. Hillary
616.831.1774
hillaryr@millerjohnson.com

Kenneth G. Hofman
616.831.1721
hofmank@millerjohnson.com

Lauretta K. Murphy
616.831.1733
murphyl@millerjohnson.com

Nathan D. Plantinga
616.831.1773
plantingan@millerjohnson.com

Catherine J. Rische
616.831.1760
rischec@millerjohnson.com

Mark E. Rizik
616.831.1744
rizikm@millerjohnson.com

Stephen R. Ryan
616.831.1746
ryans@millerjohnson.com

Christopher "C.J." Schneider
616.831.1738
schneiderc@millerjohnson.com

Tripp W. Vander Wal
616.831.1796
vanderwalt@millerjohnson.com

Matthew L. Vicari
616.831.1762
vicarim@millerjohnson.com

Sarah K. Willey
269.226.2957
willeys@millerjohnson.com

If you received this from someone else and wish to receive your own copy, please send your name, company name and e-mail address to healthcarereformteam@millerjohnson.com.

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