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Employee Benefits & Executive Compensation ADVISORY ■

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IRS Notice 2015-17: Pardon for Employer Payment Plans? Or Just a Stay of Execution?

In Notice 2015-17, the IRS granted limited transition relief for certain employer-sponsored arrangements involving individual major medical health coverage that might otherwise violate the Affordable Care Act (ACA). More specifically, Notice 2015-17 provides relief from excise taxes under Code Section 4980D for violations of the health insurance reforms, and the corresponding obligation to report violations on IRS Form 8928, for the following types of "employer payment plans":

- Employer payment plans maintained by employers that were too small to be considered an applicable large employer under the Code Section 4980H "employer responsibility" provisions for 2014 and 2015. There is no relief for employers with 50 or more full-time employees (including full-time equivalents). In addition, this relief is temporary, ending on June 30, 2015; and
- Certain employer payment plans that cover only more-than-2-percent shareholders of a Subchapter S corporation.

Practice Pointer: An employer payment plan is any arrangement through which an employer pays, directly or indirectly (e.g., including direct or indirect payments with after-tax dollars), an employee's premiums for major medical coverage purchased in the individual market (inside or outside the exchange) and/or Medicare Part B or D premiums. Employer payment plans will violate one or more of the health insurance reforms added by the ACA (including the prohibition on annual dollar limits on essential health benefits and the requirement to provide preventive care without cost sharing) and as such, excise taxes of up to $100 per day per employee would apply under Code Section 4980D. See IRS Notice 2013-54 and Agency ACA FAQs XXII.

The Notice also describes and clarifies the types of permissible arrangements that can be used for employers to reimburse Medicare Part B or D premiums or Tricare expenses without running afoul of the health insurance reforms. Finally, the IRS clarifies the application of Notice 2013-54 to certain after-tax arrangements that directly or indirectly reimburse employees for individual market premiums.

Practice Pointer: Notice 2015-17 does *not* change the conclusions reached in Notice 2013-54 regarding employer payment plans and HRAs. Arrangements that pay or reimburse an employee's premiums for major medical coverage purchased in the individual market still violate the health insurance reforms added by the ACA. Rather, Notice 2015-17 provides limited relief from the excise taxes that would otherwise be imposed under Code Section 4980D on such arrangements.

Temporary Transition Relief for Small Employers

Employers that maintained an employer payment plan will not be subject to Section 4980D excise taxes (and will not be required to file a Form 8928 for 2014) because they maintain such a plan if they were *not* an applicable large employer in 2014 (as that term is defined in Code Section 4980H). Likewise, the relief will continue through June 30, 2015, if the employer is not an applicable large employer in 2015. An employer is not an applicable large employer for a year if it employed on average less than 50 "full-time equivalents" in the prior calendar year.

This relief does *not* apply to stand alone HRAs or HRAs that reimburse medical expenses *other than insurance premiums*.

Practice Pointer: This Notice clarifies several aspects concerning the scope of IRS Notice 2013-54. First, the IRS makes clear in this guidance that an employer's payment of Medicare Part B and/or D premiums is an impermissible employer payment plan except as provided in the Notice. Second, by excluding more traditional HRAs (i.e., HRAs that reimburse expenses other than premiums) from the transition relief, the IRS makes it clear that the Notice 2013-54 prohibitions apply to all arrangements that pay for or reimburse individual market health premiums. Many had previously taken an erroneous position that HRAs that reimburse solely individual market premiums were allowable under the prior Notice. Presumably, the limited transition relief is an acknowledgement of the confusion on this issue.

Subchapter S Arrangements

IRS Notice 2008-1, 2008-2 I.R.B. 1, provides that if a Subchapter S corporation pays for or reimburses premiums for individual health insurance coverage covering a more than 2 percent shareholder (as defined in Code Section 1372(b)(2)), the payment or reimbursement is included in income, but the more than 2 percent shareholder-employee may deduct the amount of the premiums under Code Section 162(l). Separately, and at least until the end of 2015, transition relief is provided for certain arrangements whereby Subchapter S corporation more than 2 percent shareholders took a Section 162(l) deduction for individual market coverage. The fact that transition relief is needed for such arrangements is surprising for many. This is because plans that cover fewer than two active "employees" on the first day of the plan year are generally not subject to the ACA health insurance reforms. Since more than 2 percent Subchapter S shareholders are considered self-employed, it would seem that the ACA provisions would not apply. However, this Notice clarifies that, absent the transition relief, health insurance reforms apply to arrangements maintained by Subchapter S corporations that cover two or more employees *without regard to whether the employees are more than 2 percent shareholders*. No relief would apply if any employees (other than the more than 2 percent shareholder) were covered under the arrangement.

Practice Pointer: The Notice indicates that the agencies expect to issue additional guidance in the future regarding the application of the health insurance reforms to more than 2 percent shareholder arrangements. Although not addressed in the Notice, it would seem that similar relief may be necessary for other self-employed individuals who are allowed to take a Section 162(l) deduction for individual market health insurance such as partners in a partnership.

The Notice also indicates that the IRS and Treasury are considering whether additional guidance is needed regarding the federal tax treatment of health coverage provided to more than 2 percent shareholder employees. Until then, Subchapter S corporations and more than 2 percent shareholders may continue to rely on Notice 2008-1. However, steps must be taken to ensure that any deduction under Section 162(l) is coordinated with premium tax subsidies that might otherwise be available as addressed in Revenue Procedure 2014-41.

Medicare Premium Reimbursement Arrangements

Under the rules set forth in Notice 2013-54, an employer payment plan cannot be integrated with Medicare since Medicare is not a group health plan. Therefore, an arrangement that reimburses Medicare premiums will generally run afoul of certain health insurance reforms (to the extent the arrangement covers two or more active employees on the first day of the plan year). Notice 2015-17 indicates that certain employer payment plans that reimburse Medicare Part B and/or D premiums will be considered integrated with a group health plan for purposes of the health insurance reforms if the following conditions are satisfied:

- The employer offers a group health plan (other than the employer payment plan) that provides minimum value coverage;
- The employee participating in the employer payment plan is actually enrolled in Medicare;
- The employer payment plan is available *only* to those who are enrolled in Medicare; and
- The employer payment plan limits reimbursement to Medicare Part B or D premiums and excepted benefits, including Medigap premiums.

Practice Pointer: Employers should proceed with caution regarding this portion of the Notice. While this arrangement may not run afoul of health insurance reforms, it will violate Medicare's secondary payer (MSP) rules unless a small-employer MSP exception applies. Thus, employers with 20 or more employees could not establish such an arrangement without violating the MSP rules for age-based Medicare and no employer (regardless of size) could offer this arrangement to an employee entitled to Medicare due to end-stage renal disease (ESRD) during the ESRD coordination period.

Tricare Arrangements

Tricare, like Medicare, is not considered an employer group health plan. As a result, such coverage cannot be integrated with an employer payment plan (such as a plan reimbursing individual medical premiums). Notice 2015-17 provides similar relief for HRAs that reimburse expenses incurred by employees covered by Tricare. Such an arrangement will be considered integrated with a "group health plan" for purposes of the health insurance reforms if the following conditions are satisfied:

- The employer offers a group health plan (other than the reimbursement arrangement) that provides minimum value;
- The employee participating in the reimbursement arrangement is actually enrolled in Tricare;
- The reimbursement arrangement is available *only* to those who are enrolled in Tricare; and
- The reimbursement arrangement limits reimbursement to cost share under Tricare and excepted benefits, including Tricare supplemental arrangements.

Practice Pointer: Like Medicare, Tricare has strict coordination rules that make this type of arrangement illegal for employers subject to Tricare coordination.

After-Tax Arrangements

Notice 2013-54 left the door open for certain employer after-tax arrangements that do not rise to the level of an Employee Retirement Income Security Act of 1974 (ERISA) sponsored plan. One of the most misunderstood aspects of the 2013 guidance is what level of employer involvement may be necessary for an employer after-tax arrangement to be considered an ERISA plan.

This Notice clarifies the outer parameters of Notice 2013-54 by addressing the following types of after-tax arrangements:

- ***Mere pay increase that is not restricted is OK***. If an employer increases compensation to assist employees with payments for individual market coverage, the arrangement is not an employer payment plan as long as the increased compensation is not conditioned on the employee's purchase of individual market coverage.
- ***Including premium reimbursements (conditioned on purchase of coverage) in income still results in an employer payment plan***. If an employer pays an individual market premium directly or reimburses an employee upon proof of premium payment, the arrangement would be an employer payment plan subject to Notice 2013-54 even if the employer includes the amount in taxable income.

Notices 2015-17 and 2013-54 clarify that an employer payment plan includes the employer's payment of individual premiums with after-tax dollars. But how much is too much for employer involvement? Would it be too much to provide employees a "warm handoff" to a website that makes individual coverage available? What if the employer co-sponsors a website where individual market plans are sold? Is a clear disclaimer adequate to remove the "taint" of employer involvement? Only time will tell as literally hundreds of cases outline the parameters of ERISA coverage (under the so-called voluntary group plan exception).

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