



Tuesday, November 18, 2014

Agencies Confirm Premium Reimbursement and Member Dumping Are Very Bad Ideas

The Internal Revenue Service and the Department of Labor (“the Agencies”) recently released Affordable Care Act (ACA) [Frequently Asked Questions Part XXII](#) regarding premium reimbursement arrangements as a follow-up to [previously-issued Questions & Answers](#) on premium reimbursement and [previously-issued guidance](#) on the application of ACA provisions to health reimbursement arrangements (HRAs), certain health flexible spending arrangements (health FSAs) and certain other employer health care arrangements.

In the most strongly worded guidance on the topic to-date, the Agencies state unequivocally that employers may not reimburse employees, either on a pre-tax or post-tax basis, for the cost of insurance coverage obtained in the individual market. The Agencies also confirm that employers may not provide incentives to high-cost claimants to drop employer coverage and obtain individual insurance, which would violate ERISA’s nondiscrimination rules and other federal rules.

Reimbursement Arrangements

The Agencies previously stated that health reimbursement arrangements (HRA) not integrated with a group health plan or employer payment plans (collectively, “premium reimbursement arrangements”) are themselves group health plans and therefore violate certain provisions of the ACA. The prior guidance, however, left open the idea that employers could reimburse individual coverage on a post-tax basis.

The newly-released guidance clearly states that premium reimbursement arrangements are group health plans whether payment or reimbursement is provided on a pre-tax or post-tax basis. Therefore, employers are no longer permitted to reimburse employees or pay insurers directly for individual health insurance policies.

We note that this guidance has additional potential implications. While the Agencies’ clear focus was on vendors promoting reimbursement plans for individual insurance policies, the inclusion of post-tax arrangements into the mix may spell trouble for employers who routinely reimburse executives and others for their individual insurance costs—a practice that has occurred for years with the IRS’ blessing. (For example, if an executive or a salesperson lived or had family who lived in a part of the country not serviced by the employer’s group health plan.)

“Marketplace Dumping”

The Agencies also affirm that employers may not offer high claim risk members an incentive to leave the employer sponsored plan and purchase individual coverage. In the FAQ, the Agencies note that this practice discriminates based on one or more health factors for two reasons. First, the offer of cash actually *increases* the premium because the individual with an adverse health factor must forgo the cash to elect group health coverage. Thus, the individual with an adverse health factor effectively pays a higher premium than those without the adverse health factor. Second, although the HIPAA nondiscrimination rules allow “benign discrimination” (i.e., discrimination that helps individuals with adverse health factors), this practice discourages enrollment in the group health plan and is, therefore, not benign.

PPACA REGULATIONS & GUIDANCE ISSUED IN THE LAST 3 MONTHS

- Sep. 2014: IRS Issues [Notice 2014-49 Guidance on Employer Shared Responsibility Look-Back Method Changes in Measurement Period](#)
- Sep. 2014: IRS Issues [Notice 2014-55 Guidance on Additional Permitted Cafeteria Plan Election Changes](#)
- Sep. 2014: IRS Issues [Notice 2014-56 Guidance on Adjusted 2014 PCORI Fee](#)
- Oct. 2014: ACA FAQs Part XXI – [Limitations on Cost Sharing](#)
- Oct. 2014: HHS announces [Delay of HPID Compliance](#)
- Nov. 2014: IRS Issues [Notice 2014-69 Minimum Value Plans and Hospital Coverage](#)
- Nov. 2014: ACA FAQs Part XXII – [Premium Reimbursement Arrangements](#)
- Nov. 2014: HHS announces [Extension of 2014 Transitional Reinsurance Contribution Filing Deadline](#)

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