...From the Employer Perspective

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Last Call For Non-Calendar Year Cafeteria Plan Transition Relief – Elevated Importance In Light of Uncertainty Around Marketplace Special Enrollment

In a prior HCR*Alert!*, we reported on transition relief offered by the IRS for non-calendar year ("fiscal year") Section 125 cafeteria plans for the purpose of the initial public individual insurance marketplace ("marketplace") enrollment period. The purpose of this HCR*News* is to highlight the significance of this transition relief. If you sponsor a fiscal year plan that ends after Apr. 30, 2014 and have not already done so, we strongly suggest you consider implementing this transition relief throughout the initial marketplace enrollment period and rigorously communicate this option to employees.

When is the initial marketplace enrollment period and what is the transition relief available to fiscal year plans?

The initial marketplace enrollment period is Oct. 1, 2013 – Mar. 31, 2014 (coverage begins in 2014.) In earlier guidance, the IRS confirmed that, under existing Section 125 cafeteria plan rules, open enrollment for the marketplace does not constitute a qualified life event that would allow for a mid-year cafeteria plan election change. Therefore, without the transition relief, employees enrolled in fiscal year plans would be locked into their 2013-2014 plan year elections and would not be able to move to marketplace coverage if desired during the initial marketplace enrollment period.

The transition relief allows a fiscal year plan sponsor to amend its plan specifically to allow an employee to revoke a salary reduction election once during the 2013-2014 plan year without a qualified life event, implicitly to move to a marketplace policy during the initial enrollment period.[1] This transition relief is a one-time exception for the 2013-2014 plan year only. Plan sponsors adopting this transition relief are permitted flexibility in structuring the amendment in that they may choose to permit participants to make one such change at any time during the 2013-2014 plan year or only during a limited time period within the 2013-2014 plan year as defined by the plan sponsor (e.g., in January 2014 only).

Why is it important for fiscal year plan sponsors to consider this transition relief?

Many fiscal year plan sponsors have already chosen to adopt this transition relief, either with or without narrow time constraints for requesting an election change. Others may have elected not to adopt it based on the assumption that interested employees could obtain marketplace coverage at the conclusion of the cafeteria plan year. It is also possible that some employees who were offered the transition relief may not have taken advantage of it for the initial marketplace enrollment and deferred evaluating marketplace options until the end of the cafeteria plan year. ***However, information has come to light that casts doubt regarding the ability of fiscal year cafeteria plan participants to obtain marketplace coverage at the end of a cafeteria plan year that ends outside of a marketplace open enrollment period unless a participant is determined to***

be <u>newly eligible</u> for a premium tax credit because the employer plan is no longer affordable or no longer meets minimum value.

Doesn't the insurance marketplace have special enrollment provisions for status changes that occur outside of marketplace open enrollment?

The marketplace legislation does include special enrollment provisions for certain circumstances under which individuals may enroll for marketplace coverage outside of a marketplace open enrollment period. It was generally expected that the marketplace special enrollment provisions would view voluntary termination of coverage during open enrollment for an employer-sponsored fiscal year plan as an event that would permit mid-year enrollment in the marketplace. While this expectation is reasonable given that participants in calendar year cafeteria plans can easily obtain marketplace coverage after voluntarily terminating employer-sponsored coverage at the end of a plan year (because it coincides with marketplace open enrollment), the marketplace special enrollment provision language does not specifically identify the fiscal plan year situation in its discussion of special enrollment.

While no formal statements have been made on this issue, sources within CMS recently responded to informal inquiries from Trion's legal counsel by indicating that CMS' current interpretation of the marketplace special enrollment provisions **does not** include voluntary termination of employer-sponsored coverage at the end of a fiscal year plan year as a qualifying marketplace special enrollment event (unless an individual is becoming eligible for a premium tax credit for the first time).

What is the implication of this response from CMS on fiscal year employer-sponsored plan participants?

The implication of this response is that, beyond the 2013-2014 transition relief, individuals enrolled in fiscal year employer plans who would like to terminate employer-sponsored coverage and move to marketplace coverage would not be able to enroll for marketplace coverage until the beginning of the calendar year that follows the end of the employer plan year and would therefore have to deal with a potential gap in coverage. An individual in this situation might be able to obtain individual coverage sold outside the marketplace to fill the coverage gap, if available. Special enrollment provisions for individual policies sold off-marketplace (i.e., whether fiscal year plan open enrollment is considered a qualifying event) may vary from state to state or from insurer to insurer. If an off-marketplace policy is not available to an affected individual, he or she would be forced to endure either a gap in coverage or a period of dual coverage in order to transition to marketplace coverage.

> *Example:* An individual is covered under an employer-sponsored plan that runs from 7/1 – 6/30. The individual wishes to discontinue coverage when permitted during the employer plan open enrollment in mid-2014 and enroll in marketplace coverage. Voluntary termination of employer-sponsored coverage as a result of the fiscal year plan's open enrollment period does not appear to be a qualifying event that entitles the individual to a marketplace special enrollment period; therefore, the individual would not be able to enroll for marketplace coverage until 1/1/15.
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> To avoid a gap in coverage after dropping employer-sponsored coverage on 6/30/14, the individual would need to purchase an off-marketplace individual policy effective 7/1/14, terminate that policy on 12/31/14, and then enroll in marketplace coverage effective 1/1/15. If

off-marketplace individual coverage is not available for a 7/1/14 effective date, the individual's only options would be to either experience a gap in coverage until marketplace coverage becomes effective on 1/1/15 or maintain employer-sponsored coverage until 6/30/15, resulting in dual coverage during the overlapping time period.

What can fiscal year plan sponsors do in light of this uncertainty around marketplace special enrollment?

While it is hard to imagine there was intent in the legislation to create this conundrum and inflict disparate treatment on participants of fiscal year employer-sponsored plans compared to participants of calendar year plans, at this time CMS' apparent interpretation of the rules does not provide a solution. We hope there will be a favorable resolution to this problem but, in the event one is not reached before the end of a fiscal year plan's 2013-2014 plan year, **we recommend that plan sponsors make the transition relief available to plan participants for the duration of the initial marketplace enrollment period and make efforts to ensure participants are fully aware of this option to alleviate potential hassles for employees that were planning to consider marketplace options at the end of the 2013-2014 plan year.**

The initial marketplace enrollment period lasts through Mar. 31, 2014. Coverage applied for during the initial enrollment period may begin as late as May 1, 2014, depending upon application date. Therefore, this issue affects only participants of fiscal year plans that end after Apr. 30, 2014. (There are rumblings that the initial enrollment period might be extended due to early technical difficulties; however, this is speculative at this point and should not be counted upon.)

- Sponsors of plans that end after Apr. 30, 2014 and before Dec. 31, 2014 who opted not to adopt the transition relief should reconsider doing so as soon as possible so that participants may take advantage of it before the initial marketplace enrollment period ends (including any waiting period until coverage begins, e.g. until May 1, 2014).
- Sponsors of plans that end after Apr. 30, 2014 and before Dec. 31, 2014 who adopted the transition relief but limited election changes to a specific timeframe (e.g., Jan. 2014 only) should consider extending that period to any time during the 2013-2014 plan year to allow participants to take advantage of it through the end of the initial marketplace enrollment period (including any waiting period until coverage begins, e.g. until May 1, 2014).
- Plan sponsors offering the transition relief should earnestly communicate this option to plan participants and make them fully aware of the uncertain situation surrounding the ability to enroll in marketplace coverage at the end of a plan year.
- Plan sponsors adopting the transition relief must formally amend their plan documents accordingly no later than Dec. 31, 2014.

ADDITIONAL PPACA REGULATIONS & GUIDANCE ISSUED IN THE LAST 3 MONTHS

Dec. 2013: HHS Issues Interim Final Rule Extending Exchange Enrollment Deadline for 1/1/13 Coverage
Dec. 2013: Agencies Issue Proposed Regulations on Excepted Benefits
Jan. 2014: Departments Issue FAQs on Preventive Services, Cost-Sharing Limits, Expatriate Plans, Wellness Programs, Fixed Indemnity Insurance and MHPAEA
Jan. 2014: IRS Issues Proposed Regulations on Minimum Essential Coverage and Other Rules Regarding the Shared Responsibility Payment for Individuals

Feb. 2014: IRS Issues Final Regulations on Shared Responsibility for Employers

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[1]The transition relief also permits plan sponsors to, at their discretion, allow employees who are not enrolled in the plan to make a mid-year election to participate in order to comply with the individual mandate; however, subsequent guidance provided that employees who are eligible for fiscal year plans are exempt from the individual mandate until the first day of the 2014 plan year, thus eliminating a compelling need for employers to allow mid-year enrollments.