HEALTH CARE REFORM NEWS

...From the Employer Perspective

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Reading Between The Lines

In our September 29, 2014 edition of Trion's *Health Care Reform News*, Affordable Care Act Checklist for Employers – Countdown to 2015, we cautioned not to miss 'the fine print" and highlighted some commonly overlooked details of various ACA requirements. Sometimes, however, staying abreast of the ACA requires more than reading the fine print – it requires reading between the lines. In this edition of *Health Care Reform News,* we draw attention to two such situations.

AFFORDABILITY OF EMPLOYER-SPONSORED HEALTH CARE – IMPACT OF WAIVER CREDITS

The individual shared responsibility provision of the ACA requires individuals to have qualifying minimum essential health care coverage, qualify for a health coverage exemption, or make a shared responsibility payment when filing a Federal income tax return. The Internal Revenue Service (IRS) recently released final regulations regarding Minimum Essential Coverage and Other Rules Regarding the Shared Responsibility Payment for Individuals. A section of these final regulations which pertains to exemption from individual shared responsibility for individuals who cannot afford coverage addresses how employer contributions will be taken into account for the purposes of determining the affordability of employer-sponsored coverage:

> "[T]he final regulations provide that, for the purposes of determining the affordability of coverage, the required [employee] contribution is reduced by any contributions made by an employer under a section 125 cafeteria plan that (1) may not be taken as a taxable benefit, (2) may be used to pay for minimum essential coverage, and (3) may be used only to pay for medical care within the meaning of section 213."

While many agree this language is confusing at best, a common consensus has emerged regarding a surprising implication. Although it is inconsistent with conventional views of employee cost, it appears amounts offered to employees who waive coverage under the employer's health plan (e.g., cash payments or benefits credits) will be treated as additional required employee contributions for the purposes of affordability. For example:

> Facts: The total premium for single coverage under an employer's health plan is $500 per month. If an employee elects single coverage, the employee's required payroll contribution is $150 per month and the employer contributes the remaining $350 of premium. Alternatively, if an employee waives coverage, the employer offers a cash payment of $50 per month.

> Conclusion: For the purposes of determining affordability, the required employee contribution is $200 per month. Because $50 per month can be taken as a taxable cash benefit, only $300 of the employer's $350 contribution is recognized as reducing an employee's premium cost. Said another way, because an employee who elects coverage must forgo a $50 cash payment in addition to paying $150 toward the premium cost, the perceived net cost to the employee is $200.

It is important to note the subject of these recently released regulations is individual shared responsibility under IRC section 5000A and the language noted above is applicable specifically to the affordability exemption from individual shared responsibility. It is not directly applicable to employer affordability safe harbors related to employer-shared responsibility under IRC section 4980H, which are outlined under separate regulations. However, unless the IRS has a change of heart with regard to its position on this topic, it is anticipated the IRS will use these regulations as a model for future similar rulemaking applicable to the employer shared responsibility affordability safe harbors.

What You Should Do

Employers that provide cash, benefits credits or other financial consideration for waiver of medical coverage should discuss this recent IRS regulation with their legal counsel and determine whether modification of the employer's health care contribution structure is necessary to ensure the affordability provisions of the ACA employer mandate are satisfied. The regulations could affect the employer affordability safe harbor provisions as of January 1, 2015.

HEALTH CARE ELIGIBILITY STATUS OF EMPLOYEES WHO ARE INACTIVE BUT NOT TERMINATED (UNDER THE LOOK-BACK METHOD)

Under the look-back method for determining employee full-time status, an employee who averages 30 or more hours of service per week during a measurement period must be treated as a full-time employee for the entire subsequent stability period, regardless of the employee's number of hours of service during the stability period, "so long as the worker remains an employee". For example:

> Employer A uses an annual standard measurement ("look-back") period of November 1 – October 31 and a corresponding standard stability period of January 1 – December 31. An employee who averages 30 or more hours per week from November 1, 2013 – October 31, 2014 must be treated as a full-time employee from January 1, 2015 – December 31, 2015, regardless of the number of hours the employee actually works during 2015, provided he or she remains an employee.

Application of this concept is straightforward when an employee remains in active service for the entire stability period, but what happens when an employee is not actively working for a period of time during a stability period and is not terminated from employment? In the past, it was not uncommon for employers to establish internal policies that suspend health care coverage eligibility and/or employer subsidies during periods of unpaid leave (not otherwise protected by

law, such as FMLA) or employment inactivity. Does the ACA affect those policies and practices? While the regulations are not explicit on this point, it appears the answer is yes.

The look-back method rules outline how to treat an employee who was previously in a stability period and resumes service *after* a period of no service due to termination of employment or other absence. An employee may be treated as having terminated employment and treated as a new employee upon the resumption of services if the employee did not have an hour of service for a period of at least 13 consecutive weeks (26 weeks if employer is an educational organization).

However, the rules do not provide direction regarding how an employee should be treated *during* a period of no service that is due to "other absence" rather than termination of employment. In fact, the regulations specifically state that the rule above "does not determine whether the employee is treated as a continuing full-time employee or a terminated employee during the period during which no hours of service are credited."

Furthermore, when drafting the regulations, the IRS purposely declined to provide guidance on when an employer may treat an employee who is not working as having separated from service. The IRS noted that "separation from service is relevant in a number of contexts beyond section 4980H, such as eligibility to receive a distribution from a qualified plan and the requirement to provide a notice of continuation coverage under COBRA" and that, unless further guidance is issued, employers "may determine when an employee has separated from service by considering all available facts and circumstances and by using a reasonable method that is consistent with the employer's general practices for other purposes, such as the qualified plan rules, COBRA, and applicable State law."

The good news is employers appear to have some flexibility in determining when an employee is separated from service. In the category of not-so-good news, it appears unless an employee is formally terminated from employment; an employer using the look-back method must treat an employee as an ongoing employee in a stability period even during periods of unpaid leave or extended inactivity. In other words, an employer could be subject to an employer shared responsibility penalty if health care coverage eligibility and/or employer subsidies are suspended during a period of no service for a non-terminated employee who earned full-time status for the stability period and the employee receives a Federal subsidy for marketplace coverage as a result of being offered no employer-sponsored coverage or unaffordable coverage.

Employers should keep in mind that this situation is not limited to variable hour employees. Under the look-back method rules, all employees who have been employed for a full standard measurement period are subject to the measurement and stability period process – including regular full-time employees. Thus, an ongoing, regular full-time employee is also in a stability period and would continue to be treated as a full-time employee during a period of no service within the stability period.

Employers are not required to maintain coverage during a period of unpaid absence if an employee fails to make timely payment of the employee portion of the premium. For this purpose,

the rules regarding timely payment for COBRA continuation of coverage (§ 54.4980B–8, Q&A–5(a), (c), (d) and (e)) also apply to payment of employee contributions during such a period.

What You Should Do

Existing employer termination, rehire and leave of absence policies have been developed based on best practices for the business. Employers should evaluate their current policies and practices, keeping these new ACA health care coverage implications in mind. To avoid future difficulty if such an eligibility situation arises, document the organization's specific rules around inactivity and termination as well as how health care coverage is treated during the inactive period, upon termination and upon rehire.

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
Nov. 2014: HHS Issues Notice of Benefit and Payment Parameters for 2016 Proposed Rule and Fact Sheet
Nov. 2014: HHS Issues Draft 2016 Actuarial Value Calculator and Draft Calculator Methodology
Nov. 2014: CMS Issues Guidance on Hardship Exemptions for Individual Mandate
Nov. 2014: IRS Issues Final Regulation on Minimum Essential Coverage and Other Rules Regarding Shared Responsibility Payment for Individuals

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