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HEALTH CARE REFORM
IRS Soliciting Comments for Upcoming Regulations

The IRS is preparing to propose new regulations related to the Health Care Reform Act. To assist in this process, it issued three notices last week to solicit comments from the benefits community. Specifically, the IRS is requesting comments on (i) calculating "minimum value" for purposes of the unaffordability penalty, and (ii) coordinating the filing requirements imposed on plan sponsors and the issuer of the actual coverage (*i.e.,* the insurance carrier or the employer for self-funded coverage). Below is a summary of each notice and its potential impact on plan sponsors.

NOTICE 2012-31
Calculation of Minimum Value for Employer Unaffordability Penalty

Unaffordability Penalty. Beginning in 2014, eligible individuals who purchase coverage through an Insurance Exchange ("Exchange") may receive a premium tax credit unless they are eligible for other "minimum essential coverage". *Minimum essential coverage* includes coverage under an employer-sponsored plan that both: (i) is affordable to the employee (*i.e.,* employee contributions are no more than 9.5% of the employee's household income), and (ii) provides "minimum value". If an employer's group health plan (other than specified disease coverage or stand-alone dental and vision coverage) fails to provide minimum essential coverage, it will be liable for the unaffordability penalty under Section 4980H of the Internal Revenue Code (the "Code").

Determining Minimum Value. A plan will fail to provide *minimum value* if the plan's share of the total allowed costs of group health benefits is less than 60%. The unaffordability penalty is assessed monthly, and it is 1/12 of $3,000 for every employee who receives coverage through an Exchange and who is eligible for a premium tax credit. The penalty is capped annually at $2,000 times the number of full-time employees.

The IRS is currently considering allowing a plan to use one of the three following approaches to determine if the plan provides minimum value:

- ***Calculators.*** An actuarial value calculator (an "AV calculator") for fully insured coverage or a minimum value calculator (an "MV calculator") for self-funded benefits to be made available by HHS and the IRS. This would permit a plan to enter information about the

plan's benefits, coverage of services, and cost-sharing terms to determine whether the plan provides minimum value.

- ***Actuarial Certification.*** For plans with nonstandard features that are beyond the scope of the AV calculator or the MV calculator, a certification by an actuary that the plan provides minimum value.

- ***Checklists.*** Design-based safe harbor checklists that would provide a simple, straightforward way to ascertain minimum value without the need to perform any calculations or obtain the assistance of an actuary.

Related Issues. The IRS is also seeking comments on the following which may be of interest to employers:

- The terms that should be included in the safe harbor checklists and the types of plans for which the safe harbor checklists should be developed.

- Whether employer contributions to a health savings account (an "HSA") or health reimbursement account (an "HRA") may be included in the minimum value calculation.

- Whether the value determined by the AV calculator or the MV calculator could be adjusted to take into account other benefits provided under the plan. For example, how could wellness benefits be added to the value generated by the AV calculator or the MV calculator to determine whether an employer-sponsored plan provides minimum value?

- Whether there are other benefits that employer-sponsored plans cover today or are likely to cover in the future that might not be captured by the MV calculator.

- If an independent actuarial value certification is used, what standards and safeguards should be applied to ensure that the plan meets the 60% actuarial value threshold?

Some plans with complex benefits structures may not be able to determine actual or minimum value for their group health benefits using the AV or MV calculators or the design based safe harbor checklists. However, requiring an employer to submit an appropriate certification by an actuary to show that the plan provides minimum value would be costly. Employers may want to submit comments to the IRS requesting that the calculators and checklists be designed to take into account nonstandard features without the use of an actuary.

NOTICE 2012-32

Reporting of Health Care Coverage

The IRS also seeks comments on the reporting requirements under Code Section 6055.

Under this section, an issuer (*i.e.,* the insurance carrier or the employer for self-funded coverage) that provides minimum essential coverage after January 1, 2014 must file annual returns with the IRS and provide individual participants with a written statement showing the information reported on that individual. Individuals will use these statements to prepare their individual tax returns.

The return filed with the IRS will contain:

- Identifying information about each individual for whom minimum essential coverage is provided;
- Dates each individual was covered;
- For health insurance coverage, whether the coverage is a qualified health plan offered through an Exchange; and
- For insurance carriers offering coverage through an employer's group health plan, identifying information about the employer, the portion of the premium that the employer will pay and information to facilitate tax credits for small employers' insurance expenses.

The IRS requests comments on the following issues:

- How to determine when an individual's coverage begins and ends for purposes of reporting dates of coverage;
- Reporting when an individual is covered by one type of coverage during part of the year, but a second type of coverage during the rest of the year;
- How to minimize duplication between the reporting of health coverage by insurance carriers and employers;
- How to coordinate and minimize duplication between the various reporting obligations imposed on employers that sponsor self-insured plans; and
- Who is required to report under Code Section 6055 (and whether special rules should apply) when minimum essential coverage is provided through a voluntary employees' beneficiary association (a "VEBA").

NOTICE 2012-33

Reporting of Health Care Coverage by Large Employer-Sponsored Plans

The IRS also requests comments on the reporting requirements under Code Section 6056 for employers with 50 or more full-time employees. Code Section 6056 requires that certain information on employer-provided health care coverage provided on or after January 1, 2014, be reported to the IRS and disclosed to employees. The first information returns will be required to be filed in 2015.

Code Section 6056(d) permits the IRS to allow employers to satisfy the filing requirements under Code Section 6056 by filing a return under Code Section 6055 (discussed above) or including the information in the Form W-2. The insurance carrier may also provide this information to the IRS on behalf of an employer. The IRS is specifically requesting comments on how to coordinate the reporting requirements under Code Section 6056 and the reporting requirements under other applicable Code or Health Care Reform Act provisions.

Action Steps. Employers should consider whether to submit comments to the IRS. Comments for all three provisions must be submitted by June 11, 2012.

Contact Information. For more information from Mazursky Constantine, please contact Amy Heppner (404.888.8825), Kelly Meyers (404.888.8838) or Jessica Gallegos (404.888.8849). For more information from VCG Consultants, please contact Leslie Schneider (770.863.3617).

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