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IRS Releases Broad Range of Guidance in Notice 2015-87

Background

To end 2015, the IRS released Notice 2015-87, which provides guidance on a broad range of employee benefits compliance issues. The guidance is provided in a question-and-answer format, with comments requested on several issues that the IRS plans to address in forthcoming rules. The Notice supplements previous guidance on several issues, including Health Reimbursement Arrangements (HRAs) and Employer Payment Plans, providing additional clarification and, in some cases, transition relief or grace periods for compliance.

It also builds upon existing regulations with respect to affordability; issues related to the employer shared responsibility provisions in Section 4980H and related reporting requirements; health flexible spending arrangements (health FSAs); health savings accounts (HSAs); and COBRA.

Analysis

HRA Guidance

Retiree-only HRAs

A retiree-only HRA is not subject to the market reforms under the Affordable Care Act (ACA) that generally apply to group health plans. This is true even if the HRA contains amounts credited during the time the retiree was a current employee covered by an HRA integrated with a group health plan. Therefore, a retiree-only HRA may reimburse individual market premiums and is not required to be integrated with a group health plan to avoid violating health care reform rules.

Note that this exception does not apply to HRAs that cover current employees. HRAs covering current employees that are not integrated with a group health plan or that provide reimbursement for individual market premiums will generally fail to comply with health care reform requirements even if an individual also maintains coverage under an integrated group health plan.

HRAs integrated with self-only coverage

Finally, the guidance provides that an HRA integrated with self-only coverage cannot be used to reimburse expenses of a spouse or dependents. (Certain transition relief applies for plan years starting before January 1, 2017.)

Employer Payment Plans

Reimbursement for individual market coverage

Reimbursement of individual health insurance premiums through a cafeteria (Section 125) plan, via salary reduction or employer contributions, or through an HRA, is an employer payment plan that will fail to comply with the ACA health care reform requirements, and is therefore not allowed unless the coverage consists solely of excepted benefits (e.g. stand-alone dental or vision coverage).

Affordability Safe Harbor Percentage

The IRS stated that it intends to issue amended regulations allowing the employer affordability safe harbor percentage (9.5%) to adjust in accordance with the affordability percentage used to determine subsidy eligibility for individuals purchasing individual health insurance through a public exchange (i.e. 9.66% for 2016).

It is expected that the guidance will allow employers to use 9.56% for 2015 and 9.66% for 2016.

Other Affordability of Employer-Sponsored Health Coverage Issues

HRA contributions

Amounts made available for the current plan year under an integrated HRA that an employee may use to pay premiums for an eligible employer-sponsored plan are counted as an employer contribution and thus reduce the dollar amount of the employee's required contribution to determine a plan's affordability.

Health-flex contributions to Cafeteria (Section 125) plans

Employer contributions that are limited to health expenses ("health flex contributions") under a cafeteria (Section 125 plan) will also reduce the dollar amount of an employee's contribution. In order for an amount to be considered a health flex contribution, the employee:

1. May not opt to receive the amount as a taxable benefit;

2. May use the amount to pay for minimum essential coverage (MEC); and

3. May use the amount only to pay for medical care, within the meaning of Section 213.

Transition relief for non-health flex contributions

For purposes of Section 4980H(b) penalties for plan years beginning before Jan 1, 2017, employer flex contributions (even those that do not meet the definition of a health flex contribution) will be treated as reducing the amount of an employee's required contribution. However, this relief is not available with respect to a non-health flex contribution arrangement that is adopted after December 16, 2015 or that substantially increases the amount of the flex contribution after December 16, 2015.

Opt-out payments

The IRS plans to issue rules specifying that unconditional opt-out payments will need to be considered for purposes of affordability. As a result of these rules, employers will need to include the value of an unconditional opt-out incentive when determining whether a plan is affordable (as defined by the ACA) for the employee.

These regulations will also request comments on opt-outs that place conditions (such as proof of other group health coverage) upon their receipt, and on whether such conditional opt-outs should also be considered for affordability purposes.

Before these regulations take effect, the guidance clarifies that, as long as an opt-out arrangement is not adopted after December 16, 2015, employers are not required to increase the amount of an employee's required contribution by the amount of an opt-out payment (but individuals may treat it as increasing their contributions for purposes of determining eligibility for premium tax credits and compliance with the individual mandate).

Fringe benefits offered under the SCA or DBRA

Generally, employer contributions made for health coverage as a fringe benefit under the McNamara-O'Hara Service Contract Act ("SCA"), the Davis-Bacon Act, or the Davis Bacon Related Acts (collectively with the Davis-Bacon Act, the "DBRA") are not considered employer contributions and therefore do not reduce the amount of the employee contribution for purposes of eligibility for premium tax subsidies or compliance with the individual mandate.

However, as the Treasury and the IRS continue to consider how the requirements of the SCA, the DBRA, and § 4980H requirements may be coordinated, until the applicability date of any further guidance (at least for plan years beginning before January 1, 2017), employers may treat contributions toward fringe benefits that may be used to cover MEC as reducing the employee's contribution, but only to the extent that the amount of the payment does not exceed the amount required to satisfy the requirement to provide fringe benefit payments under the SCA or DBA.

Transition relief for employer reporting

Employers may report by reducing the amount of the employee contribution in accordance with the transition relief as set forth above, but employers are encouraged not to do so as this may affect whether or not an employee is eligible for a subsidy when enrolling through a public Exchange. Rather, the IRS would prefer that employers report on Line 15 of Form 1095-C accurately (not according to the transition relief), and then reconciliation would be allowed and potential penalties forgiven if applicable.

However, for employers using the reporting relief provided for non-health flex credits, opt-out incentives, and fringe benefits, the guidance encourages employers to notify employees that they may obtain accurate information about their required contribution by contacting the employer.

Employer Shared Responsibility (Section 4980H) Provisions

Shared responsibility assessable payments

The guidance confirms that the potential shared responsibility assessable payments under Section 4980H(a) and 4980H(b), respectively, are:

- $2,080 ($173.33/month) and $3,120 ($260/month) for 2015
- $2,160 ($180/month) and $3,240 ($270/month) for 2016

Hours of service

Clarification is provided with respect to counting hours of service for a leave of absence. Specifically, the guidance provides:

1. Definition of Hour of Service: An hour of service does not include:

a. an hour for which an employee is paid during a period in which no duties are performed, if such payment is made under a plan maintained for the purpose of complying with workmen's compensation, or unemployment or disability insurance laws; or

b. an hour of service for a payment that solely reimburses an employee for medical or medically related expenses incurred by the employee.

2. Short- and Long-Term Disability: Periods during which an individual is not performing services but is receiving payments due to short-term or long-term disability result in hours of service for any part of the period during which the recipient retains status as an employee unless the payments are made from an arrangement to which the employer did not contribute directly (i.e. employee is paid with after-tax contributions).

Health FSAs – carryover amounts

COBRA

A health FSA does not need to offer COBRA continuation coverage unless the amount available for reimbursement for the remainder of the year exceeds the health FSA's required COBRA premiums for that period. For purposes of determining the amount available for reimbursement, the guidance clarifies that any carryover amount is included. However, the maximum amount that a health FSA is permitted to require for COBRA premiums (i.e., 102 percent of the applicable premium) does not include any carryover amount. Instead, the applicable premium is based solely on the sum of the employee's salary reduction election for the year and any non-elective employer contribution.

Moreover, if a health FSA allows carryovers of unused amounts for similarly situated non-COBRA beneficiaries, then carryovers must be allowed for similarly situated COBRA beneficiaries, subject to the same terms. However, the health FSA is not required to allow a COBRA beneficiary to elect additional salary reduction amounts for the carryover period, or to have access to any employer contributions to the health FSA made during the carryover period. In addition, the carryover is limited to the applicable COBRA

to the health FSA made during the carryover period. In addition, the carryover is limited to the applicable COBRA continuation period.

Limits on health FSA carryovers

A health FSA may limit the availability of the carryover of unused amounts (subject to the $500 limit) to individuals who have elected to participate in the health FSA in the next year, even if the ability to participate in that next year requires a minimum salary reduction election to the health FSA. A health FSA may also limit the ability to carry over unused amounts to a maximum period (e.g. 1 year).

Employer Reporting Relief

The IRS will not impose penalties on applicable large employers (ALEs) for incorrect or incomplete information when reporting on Forms 1094-C and 1095-C if they can demonstrate a good faith effort to comply with the ACA employer reporting requirements under Section 6056. No relief will be provided to ALEs that cannot demonstrate a good faith effort to comply, or to ALEs that fail to file or issue the required statements on time.

Other Issues Addressed in the Q&A

• Educational organizations – Educational organizations are sometimes using staffing agencies to circumvent the 26-week break in service rules and special averaging rules for ALEs using the look-back measurement method. The IRS intends to propose regulations to extend the application of the special rules in some circumstances for employers such as staffing agencies when services are being provided to one or more educational organizations.

• AmeriCorps – The guidance specifies that for purposes of Section 4980H employer shared responsibility provisions, participants in the AmeriCorps program are not employees of AmeriCorps or the grantee receiving assistance through AmeriCorps for which the participant is providing services and therefore do not need to be counted for purposes of determining status as an ALE or offered coverage by the ALE if achieving full-time status to avoid potential penalties.

• TRICARE – For purposes of determining any potential employer liability under Section 4980H employer shared responsibility provisions, and for related employer reporting requirements under Section 6056, an offer of coverage under TRICARE is treated as an offer by that employer of minimum essential coverage (MEC) under an eligible employer-sponsored plan for that month.

• Separate Employee Identification Numbers (EINs) for reporting entities – Entities required to report, including ALE members of an applicable large employer group (e.g. employers that are part of a controlled group under Section 414 rules), must each file a separate Form 1094-C, and each separate form must contain the EIN of the ALE member filing the form. The same rule applies to a governmental entity's use of a Designated Government Entity (DGE).

• VA benefits and HSA eligibility – The guidance provides clarification on the recent legislation that any hospital care or medical services received from the Veterans Administration (VA) by a veteran who has a disability rating from the VA may be considered to be hospital care or medical services and would not make that individual ineligible to make HSA contributions if they are otherwise eligible.

Summary

Notice 2015-87 addresses many compliance areas about which employers have had questions. It is expected that in 2016 the IRS (and other regulatory agencies) will release further guidance and clarifications regarding the ACA and other employer compliance-related issues.

As always, should you have any questions, please contact your Parker, Smith & Feek Benefits Team. While every effort has been taken in compiling this information to ensure that its contents are totally accurate, neither the publisher nor the author can accept liability for any inaccuracies or changed circumstances of any information herein or for the consequences of any reliance placed upon it.