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§4980H Affordability – Opt-Out Guidance

The Internal Revenue Service (IRS) has released proposed rules addressing the relationship between opt-out arrangements and affordability for purposes of subsidy eligibility through a public Exchange and potential §4980H(b) penalties. First addressed in Notice 2015-87 last December, the proposed rules confirm and further clarify that unconditional opt-out payments need to be added to the employee contribution for purposes of determining affordability, while conditional opt-outs generally do not.

BACKGROUND

Individuals who are eligible for minimum value, affordable coverage offered through an employer-sponsored group health plan are not eligible for a tax subsidy if they choose to enroll in coverage through a public Exchange, and §4980H(b) requires applicable large employers (ALEs) – those with 50 or more full-time equivalents (FTEs) – to offer coverage to full-time employees and their dependents that provides minimum value and is affordable.

Coverage for both purposes mentioned above is "affordable" in 2016 if the employee's required contribution for employee-only (single) coverage does not exceed 9.66% of the employee's household income, or 9.66% of any of the employer affordability safe harbors (i.e. Form W-2, rate of pay, or Federal Poverty Level) for purposes of §4980H(b). When calculating the employee contribution amount, the employer may need to consider more than just a portion of the medical insurance premium (generally a salary reduction). Employer contributions toward things such as wellness incentives and opt-out payments may affect the amount that is ultimately taken into account for purposes of determining affordability.

Guidance issued in mid-December 2015 promised additional regulations from the IRS in regard to cash opt-outs (or cash in lieu of benefits) and determining affordability for purposes of subsidy eligibility through a public Exchange and the employer mandate under §4980H(b), indicating the intent to differentiate treatment between unconditional and conditional opt-out arrangements, which was then confirmed in the proposed rules.

EFFECTIVE DATE

The proposed rules are effective for plan years beginning on or after January 1, 2017. For purposes of compliance with §4980H(b) requirements as well as reporting on Line 15 of Form 1095-C, employers are not required to consider opt-out payments prior to plan year 2017, unless the opt-out arrangement was adopted after December 16, 2015. An opt-out arrangement will be treated as adopted after December 16, 2015 unless:

- the employer offered the opt-out arrangement (or a substantially similar opt-out arrangement) for a plan year including December 16, 2015;
- a board, committee, or similar body or an authorized officer of the employer specifically adopted the opt-out arrangement before December 16, 2015; or
- the employer provided written communications to employees on or before December 16, 2015, indicating that the opt-out arrangement would be offered to employees at some time in the future.

The proposed rule provides additional transition relief for multiemployer (i.e. union) arrangements. Opt-out payments required under a collective bargaining agreement in effect before December 16, 2015 will not have to be included in employee contribution amounts for purposes of determining affordability until the first plan year following the expiration of such agreement.

OPT-OUT ARRANGEMENTS

An "opt-out payment" is defined as a payment *"that (1) is available only if the employee declines coverage (which includes waiving coverage in which the employee would otherwise be enrolled) under the employer-sponsored plan, and (2) cannot be used to pay for coverage under the employer-sponsored plan."* An opt-out arrangement under which opt-out payments are provided is also commonly referred to as cash-in-lieu of benefits. For purposes of determining affordability for subsidy eligibility, potential penalty risk under §4980H(b) and reporting on Line 15 of Form 1095-C, some opt-out payments will increase what is considered to be the employee contribution, while others meeting certain requirements will not.

UNCONDITIONAL OPT-OUTS

When an employer offers eligible employees the option to either enroll in the group medical plan or receive a certain amount of opt-out payment instead (the only requirement to receive the opt-out payment is a waiver of coverage under the employer's group health plan), it is considered an unconditional opt-out. Any opt-out payment that meets the definition of an unconditional opt-out must be considered part of the employee contribution amount for purposes of affordability. For example, when the employee cost for health coverage is $125 per month, but there is an unconditional opt-out payment of $75 per month if coverage is waived, the employee contribution for affordability purposes is $200 ($125 + $75). If the opt-out payment is available to any employee who waives coverage, it should be used in calculating affordability for all eligible employees.

CONDITIONAL OPT-OUTS ("ELIGIBLE OPT-OUT ARRANGEMENTS")

The proposed regulations define an "eligible opt-out arrangement" as an arrangement under which the employee's right to receive the opt-out payment is conditioned on:

(1) the employee's declining to enroll in the employer-sponsored coverage; and

(2) the employee's providing reasonable evidence that the employee and all other individuals for whom the employee reasonably expects to claim a personal exemption deduction have or will have minimum essential coverage (other than coverage in the individual market).

In regard to reasonable evidence, the employer may rely on the employee's attestation that the employee and all other members of the employee's family, if any, have or will have minimum essential coverage (other than coverage in the individual market), so long as the employer doesn't know or have any reason to know that the employee or any employee family members do not have the required alternative coverage. Evidence of such coverage must be obtained at least annually. Once the reasonable evidence requirement is met, the amount of an opt-out may be excluded from the employee's required contribution for purposes of determining affordability for the entire plan year, even if the alternative coverage subsequently terminates for the employee or any other member of the employee's family.

SUMMARY

Although probably expected, the confirmation provided in the proposed rules regarding opt-out arrangements and affordability is timely as applicable large employers (ALEs) begin to consider benefit offerings for the 2017 plan year. For ALEs who currently offer opt-out arrangements, as well as for those considering such arrangements for future plan years, so long as the arrangement meets the definition of an eligible opt-out arrangement, affordability will not be affected. For ALEs who provide an unconditional opt-out arrangement, if the employee contributions are not significant and/or the opt-out payment is small, it is unlikely to matter much; however, if the employee contributions are already on the border of not being considered affordable or the opt-out payment is significant, it may be necessary to make some changes. And finally, for small employers (less than 50 FTEs), this guidance may still prove helpful to understand how opt-out arrangements offered may affect their employees' eligibility for subsidies through a public Exchange even if the employer is not actually subject to §4980H requirements.

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.