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# IRS Grants Temporary Relief for Small Employers and S Corporations on "Employer Payment Plans"

On February 18, 2015, the IRS issued Notice 2015-17 elaborating on its position that, subject to narrow exceptions, an employer violates health care reform's annual dollar limit and preventive services mandates by reimbursing or paying employee premiums for individual health insurance (because such "employer payment plans" are treated as separate group health plans that impose prohibited limits but cannot be integrated with the individual policy coverage.). The Notice grants temporary relief to small employers paying for individual (rather than group) health insurance coverage for its employees. The relief period covers all of calendar year 2014 and from January 1, 2015 through June 30, 2015. This is a significant development, particularly for 2014, when many small employers weren't even aware of the more stringent rules issued in 2013 concerning these reimbursements. Note that this relief does not extend to standalone HRAs or other arrangements to reimburse employees for medical expenses other than individual insurance premiums, which still remains prohibited.

Further, the new Notice also provided clarification that 2 percent S Corporation shareholders could in fact temporarily be either reimbursed by their corporation for individual health insurance or have their individual health insurance paid for by the corporation directly, resolving a conflict between two different prior IRS Notices.

Lastly, the Notice provides clarification regarding reimbursing individual premiums for Medicare Parts B and/or D (physician coverage and prescription drug coverage components of Medicare) and for veterans' Tri-Care coverage premiums.

### *Background*

In September, 2013, the IRS issued interpretative Notice 2013-54, laying out a position that any form of reimbursement of premiums for individual health insurance (whether purchased on the new Exchanges or not, and whether purchased with pre- or post-tax dollars) violated the ACA's prohibition on annual dollar limits and its preventive care requirements. The IRS position was based on the supposition that such reimbursement arrangements were separate health plans on their own, unless they were integrated with a group health plan. Such violation came with a very steep penalty--$36,500 per year per affected employee under Section 4980D. In

subsequent guidance, the IRS reiterated its position and provided employers with warnings that the 4980D penalties would apply for virtually any violation of Notice 2013-54.

Under the new Notice, the IRS grants temporary relief from these draconian penalties for a relatively short period of time only for employers with fewer than 50 full-time equivalents (FTEs). FTEs are all full-time employees (those regularly scheduled to work 30 or more hours per week) plus the sum of all other employees' hours in any given month divided by 120. Employers with 50 or more FTEs are known as Applicable Large Employers (ALEs), and the relief provided in the new Notice does not apply to them.

The relief granted to non-ALEs allows for reimbursement of individual health premiums for all of calendar year 2014 and for the period from January 1, 2015 through June 30, 2015, as long as the employer was not an ALE on any day during either 2014 or the first six months of 2015. In an odd twist, the Notice doesn't contemplate that in order to comply after June 30, 2015, a small employer might choose to offer group health coverage on a non-calendar year basis, resulting in a conflict with the Act's required guaranteed issue and guaranteed renewal provisions during a one-month window from November 15 through December 15 of each year.

### *Sub S Shareholder Clarification*

Prior IRS guidance (Notice 2008-1) provided scenarios whereby Subchapter S corporation shareholders of two percent or greater could either have their S corporation pay for individual health premiums directly or reimburse the S corporation shareholder for such individual premiums and claim a deduction on his or her 1040 tax return. The aforementioned Notice 2013-54 and subsequent clarifications in published FAQs appeared to conflict with this prior Notice. The new Notice 2015-17 provides temporary relief from this conflict through at least December 31, 2015 by enabling the prior mechanisms from 2008 to continue. The IRS also notes that it is considering providing guidance on this issue "shortly" for what will occur in 2016 and beyond.

### *Reimbursement of Premiums for Medicare Parts B and D*

The Notice goes on to provide guidance for purposes of complying with the annual limit and preventive services permitting an employer's reimbursement of Medicare Part B or Part D premiums to be integrated with another group health plan offered by the employer, but only if—

- The employer offers a group health plan (other than the premium reim-

bursement arrangement) to the employee that does not consist solely of excepted benefits and offers coverage providing minimum value;

- The employee participating in the premium reimbursement is actually enrolled in Medicare Parts A and B;
- Premium reimbursement is available only to employees who are enrolled in Medicare Part A and Part B or Part D; and
- Reimbursement is limited to Medicare Part B or Part D premiums and premiums for excepted benefits, including Medigap premiums.

Employers should note that these types of reimbursements are also subject to other rules, such as the Medicare Secondary Payor (MSP) rules affecting employers with 20 or more employees. For example, reimbursing Medicare premiums may violate the MSP provision that prohibits employers from offering incentives for individuals entitled to Medicare not to enroll in the employer's group health plan. Thus, this relief may be limited to employers that fall within an MSP exception, such as that available for certain small employers. If the integration criteria are not met, the arrangement would presumably violate the mandates in question, unless other relief applies. Note that retiree-only arrangements—in which not more than one active employee participates—are not subject to these mandates and do not need the relief provided in the Notice 2015-17.

### *Tri-Care Related HRAs for Veterans*

The Notice also permits an HRA that pays or reimburses medical expenses for employees covered by Tri-Care to be integrated with another group health plan offered by the employer for purposes of complying with the annual dollar limit and preventive services mandates. However, this relief is available only if—

- The employer offers a group health plan (other than the HRA) to the employee that does not consist solely of excepted benefits and offers coverage providing minimum value;
- The employee participating in the HRA is actually enrolled in Tri-Care;
- The HRA is available only to employees who are enrolled in Tri-Care; and
- Reimbursement is limited to cost-sharing and excepted benefits, including Tri-Care supplemental premiums.

Like the Medicare relief discussed above, this relief may have limited appeal since the Tri-Care incentive prohibition rules may restrict its use primarily to small employers. And, as with the Medicare relief, if the integration criteria are not met, the arrangement would pre-

sumably violate the mandates in question, unless other relief applies. The Notice also permits an HRA that pays or reimburses medical expenses for employees covered by Tri-Care to be integrated with another group health plan offered by the employer for purposes of complying with the annual dollar limit and preventive services mandates.

### *Summary*

Over the past 18 months the IRS has made clear its intent to severely limit the use of employer payment plans (whether HRAs, MERPs, or through the use of Section 125 cafeteria plans) when such plans are not integrated with another group health plan. Smaller employers (defined as those that are not ALEs) get some temporary transition relief by this new Notice, but need to seriously consider alternatives after June 30, 2015, including ceasing all reimbursements for individual premiums. While the new Notice does provide a very small loophole (whereby employers could increase the after-tax compensation of all employees without regard to whether individual health insurance premiums were paid or not), the significant penalty of $36,500 per employee per year should cause employers to be sure they comply with all of these provisions.

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