Segal Consulting

update

Compliance News for Staff Plans

August 15, 2016

Proposed Rule Affects Employers that Offer Opt-Out Payments to Employees who Decline Group Health Coverage

The Treasury Department and the Internal Revenue Service (IRS) recently issued a proposed rule on opt-out payments offered by employers to employees who decline group health coverage.[1] An opt-out payment is narrowly defined as a payment that is made only when an employee declines coverage under the group health plan. The proposed rule affects when cash opt-out payments change the amount employees are required to pay for their health care contribution when determining whether premiums are considered "affordable" under the Affordable Care Act's employer shared responsibility penalty[2] and related reporting requirements.[3]

The proposed effective date of the rule is the plan year beginning on or after January 1, 2017. Comments on the proposed rule can be submitted until September 6, 2016, and a final rule will be issued after that. With a final rule not possible until the fall, employers with calendar-year plans will need to implement changes even before a final rule is issued.

Background

Affordability of group health plan coverage is important for purposes of the Affordable Care Act's employer shared responsibility penalty and related reporting requirements (*e.g.*, how large employers complete IRS Form 1095-C). Large employers (those with 50 or more full-time employees or equivalents) that do not offer affordable coverage to a full-time employee would have to pay a penalty if that full-time employee receives a premium assistance tax credit in an Exchange/Marketplace.

Coverage is considered affordable if the employee's cost for self-only coverage does not exceed a certain percentage of their household income (9.69 percent in 2017). Because it is difficult for an employer to know an employee's household income, affordability is generally determined by comparing the employee's

Health Compliance News Highlights:

- The proposed rule governs when opt-out payments increase an employee's required contribution, thus potentially making the coverage "unaffordable" under the Affordable Care Act.
- To avoid having to increase the required contribution by the amount of the opt-out payment, the arrangement must meet specific requirements.
- Employers with calendar-year plans will need to act quickly to implement necessary changes.
- Employers also need to review their flex credit programs, as explained in Segal Consulting's February 9, 2016 *Update*.

[1] This proposed rule was published in the July 8, 2016 *Federal Register*.

[2] For more information about the employer shared responsibility penalty, see Segal Consulting's January 15, 2015 publications, "Identifying Full-Time Employees Under the Affordable Care Act's Employer Shared Responsibility Penalty," "Affordable Care Act's Employer Shared Responsibility Penalty Takes Effect in 2015" and "How the Affordable Care Act's Employer Penalty Applies in 2015 to Employers with Non-Calendar-Year Plans."

[3] For more information about these reporting requirements, see Segal's October 1, 2015 *Update*, "The IRS Has Issued Final Instructions on Affordable Care Act Reporting that Clarify Key Issues for Employers."

required contribution against certain measures of income.[4] For example, if an employee's required contribution for self-only coverage for the lowest cost plan is $95.93 per month or less for the 2017 calendar year, the plan would be considered affordable.[5]

The Proposed Rule

The proposed rule addresses opt-out payments and when those payments increase the amount of the employee's required contribution.[6] The general rule is that an opt-out payment increases the amount of the required contribution for health coverage for all employees.[7] However, under the proposed rule, an opt-out payment will not be treated as increasing the amount of the employee's required contribution only if the arrangement meets all of the following conditions:

"The general rule is that an opt-out payment increases the amount of the required premium for health coverage for all employees."

- The employee provides reasonable evidence (*e.g.*, an attestation[8]) that (1) the employee and every person in the employee's expected tax family[9] have or will have "minimum essential coverage"[10] for the period of coverage to which the opt-out payment applies, *and* (2) the minimum essential coverage they have or will have is not individual market coverage, whether obtained through the individual insurance market or a Marketplace or state Exchange. A requirement to have other group coverage (*e.g.*, through a spouse's employer) would be acceptable, but the plan terms should nonetheless specify that the opt-out payment will not be paid to any employee whose other coverage is individual market coverage.
- The reasonable evidence is provided at least every plan year (preferably during an open enrollment period or just after the plan year starts).
- No payment can be made if the employer knows or has reason to know that the employee (or any member of the tax family) does not actually have the alternative coverage (*e.g.*, through a spouse's employer).

Example: An employee who enrolls in self-only coverage pays $75 per month. An employee who waives coverage is paid $50 per month. If the opt-out arrangement meets all of the above requirements, then the opt-out payment does not increase the cost of any employee's contribution for purposes of the affordability test. For purposes of the employer penalty, each employee's required premium is $75 per month (whether the employee enrolls in the plan or waives coverage). If the opt-out arrangement does not meet all of the above requirements, the IRS will consider the required contribution to be $125 per month ($75 plus $50) for all employees (whether they enroll in the plan or waive coverage).

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[4] Employers are allowed to rely on certain safe harbors that compare the employee's required contribution to measures of income that are known to the employer (*i.e.*, W-2 wages, the employee's rate of pay or the FPL for a single individual).

[5] This calculation uses the Federal Poverty Level (FPL) safe harbor, and the single FPL for the 48 contiguous states for 2016 ($11,880) as follows: ($11,880 ÷ 12) * 9.69% = $95.93 per month.

[6] The proposed rule generally follows the approach first announced in December 2015 in Treasury/IRS Notice 2015-87. For a summary of Treasury/IRS Notice 2015-87, which first addressed the issue of opt-out payments and affordability, see Segal's February 2016 *Update*, "New Affordable Care Act Rules Affect Flex Credits, Opt-Outs and Health Reimbursement Arrangements."

[7] Notice 2015-87 includes a transition rule that shields arrangements adopted before December 16, 2015 from the application of this rule through the 2016 plan year.

[8] An employee's attestation to certain facts would be included on the form (including an electronic form) waiving covering under the plan.

[9] The employee's tax family includes the employee and any other person for whom the employee reasonably expects to claim a personal exemption deduction.

[10] Minimum essential coverage generally includes most forms of group or individual coverage. However, "excepted" benefits such as limited-scope dental or vision benefits are not minimum essential coverage.

Effective Date

As noted on page 1, the proposed effective date is the plan year beginning on or after January 1, 2017. However, there is a delayed effective date for opt-out arrangements that are required under the terms of a collective bargaining agreement in effect before December 16, 2015. For such bargained arrangements, the new rule will not apply until the later of the beginning of the first plan year that begins following the expiration of the collective bargaining agreement (disregarding any extensions) or the applicability date of the final rule on opt-out payments.

Implications for Employers

Employers with calendar-year plans will currently be in the process of setting employee contribution strategies for 2017, and preparing open enrollment materials for the fall open-enrollment period. Employers with an opt-out cash payment should ensure that the new requirements are included in any plan documents or participant communications that refer to the opt-out. For example, open-enrollment materials describing the opt-out arrangement, as well as attestation forms that waiving employees complete, will need to include new language about employees and family members having other "minimum essential coverage" coverage that is not individual market coverage. Employers will also need a process to review employee attestations regarding whether other coverage exists.

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In addition, employers that have not yet determined if their flex credit program meets the requirements set out in Notice 2015-87 should review those programs and make necessary changes. Those new rules, which are discussed in a separate Segal publication,[11] also take effect with the 2017 plan year.

How Segal Can Help

Segal works with plan sponsors and their attorneys on compliance issues. We can help design employee contribution strategies and determine if coverage meets the Affordable Care Act's "affordability" requirement. Segal can also recommend the changes that should be made to an opt-out arrangement or flex-credit program and draft open-enrollment materials and employee attestation forms.

Questions?

For more information about how these new rules may affect your plan, please contact your Segal consultant or the Segal office nearest you.

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[11] See the February 9, 2016 *Update*, "New Affordable Care Act Rules Affect Flex Credits, Opt-Outs and Health Reimbursement Arrangements."

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