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IRS Requests Comments on Health Coverage Affordability Safe Harbor for Employers

Beginning in 2014, employers may be assessed a “shared responsibility” penalty if the health coverage they offer to certain employees is “unaffordable.” The IRS recently issued Notice 2011-73, which solicits comments about a potential “safe harbor” for determining whether an employer’s health coverage is “affordable” for purposes of this penalty. Comments are due by December 13, 2011.

Background

Beginning in 2014, individuals will be able to purchase individual health insurance coverage through the Exchanges. To make that coverage more affordable, the Patient Protection and Affordable Care Act, as amended by the Health Care and Education Reconciliation Act, (referred to collectively as PPACA), created a refundable tax credit (premium tax credit) that will subsidize the cost of Exchange coverage. Generally, the premium tax credit will be available only to individuals: (1) whose household income for a taxable year is between 100 percent and 400 percent of the federal poverty level for the taxpayer’s family size and (2) who are not eligible for other “minimum essential coverage.”

Minimum essential coverage includes government-sponsored coverage, such as Medicare, Medicaid, the Children’s Health Insurance Program, and Tricare. It also generally includes employer-sponsored coverage. However, minimum essential coverage for purposes of the premium tax credit does not include employer-sponsored coverage that is “unaffordable” or that “fails to provide minimum value.” For purposes of eligibility for the premium tax credit, coverage will be considered unaffordable if the required employee contribution towards the cost of self-only coverage exceeds 9.5% of the employee’s household income. Coverage also fails to provide minimum value if it fails to pay at least 60% of the total allowed costs of benefits provided under the plan.

Under Section 4980H of the Internal Revenue Code, which was added by PPACA, employers who employ at least 50 full-time equivalent employees will be subject to an assessable payment (shared responsibility penalty) for each month in which they have full-time employees who enroll for health coverage through an Exchange and receive the premium tax credit. The monthly penalty for an employer who does not offer health coverage to its full-time employees and their dependents will be equal to the number of its full-time employees (i.e., generally those who work at least 30 hours per week) minus 30, multiplied by one-twelfth of \$2,000. The monthly penalty for an employer who offers coverage that is deemed unaffordable or fails to provide minimum value will be one-twelfth of \$3,000 multiplied by the number of full-time employees who receive the premium tax credit.

Many employers have been concerned that because affordability will be based on an employee's household income, which is generally unknown to an employer, they will have difficulty determining whether they will be subject to the shared responsibility penalty. Recently, the Internal Revenue Service (IRS) requested comments about a proposed approach to address this concern.

The Proposed Affordability Safe Harbor

In [Notice 2011-73](#), the IRS sets out a proposed safe harbor which provides that for purposes of the shared responsibility penalty only, the affordability of an employer's coverage would be measured by reference to an employee's wages from that employer. Wages for this purpose would be the total amount of wages required to be reported in Box 1 of Form W-2, Wage and Tax Statement (W-2 wages). However, an employee's eligibility for the premium tax credit would continue to be based on the affordability of employer-sponsored coverage relative to his or her household income.

BUCK COMMENT. *Basing affordability on W-2 wages rather than household income will make planning much easier for employers and will likely reduce an employer's potential liability for the shared responsibility penalty.*

Under the proposed safe harbor, an employer would satisfy the affordability requirement with respect to an employee if the required employee contribution for employee-only coverage under the lowest cost option that provides minimum value does not exceed 9.5% of that employee's W-2 wages. If the employer satisfies the affordability requirement based on W-2 wages for a particular employee (as well as any other conditions that may be imposed under the safe harbor), the employer would not be subject to the penalty with respect to that particular employee, even if that employee receives a premium tax credit.

BUCK COMMENT. *Employers that want to steer lower-paid employees to subsidized coverage through the Exchanges by providing unaffordable coverage need to keep in mind that because affordability for purposes of the premium tax credit is based on household income, some employees may not qualify for the premium tax credit even though the required contributions exceed 9.5% of the employee's W-2 wages.*

The Notice contemplates that an employer would determine whether the safe harbor is met at the end of the year. For example, in determining whether it qualified for the safe harbor for 2014, an employer would look at each employee's 2014 W-2 wages and then compare those wages to the required employee contribution for 2014 to determine whether the employee contribution exceeds 9.5% of those wages. The IRS notes that an employer could also apply the test prospectively at the beginning of the year and structure the plan and its operations so that an employee's required contribution would not exceed 9.5% of his or her W-2 wages.

BUCK COMMENT. *Employers that want to apply the test prospectively will need to keep in mind that the amount reported in Box 1 of the Form W-2 does not include certain salary reductions, such as pre-tax*

contributions to a cafeteria plan and employee elective deferrals to a 401(k) plan, which could significantly reduce W-2 wages.

Request for Comments

The Notice also solicits comments on the proposed affordability safe harbor, including the following specific issues:

- Whether or how wages and employee contribution amounts would need to be determined for employees who are employed by an employer for less than a full year, employees who move between full-time and part-time status, situations in which the plan year is not a calendar year, and other similar special circumstances.
- Whether there are other possible safe harbor methods for determining the affordability of coverage under an employer-sponsored plan for purposes of calculating an employer's potential penalty.
- How to coordinate any affordability safe harbor with the full-time employee look-back/stability safe harbor described in Notice 2011-36, which requested comments on other issues related to the shared responsibility penalty, specifically on who is a "full-time employee." (See our June 2, 2011 [For Your Information](#).)

Comments must be submitted by December 13, 2011.

Conclusion

If adopted as currently proposed, the affordability safe harbor will provide predictability to employers who had been concerned about their ability to determine their potential exposure to the shared responsibility penalty.

Buck's consultants are available to assist you in determining how PPACA's employer shared responsibility provisions and the suggestions made in Notice 2011-73 would affect your group health plans and in preparing comments that you may wish to submit.

This FYI is intended to provide general information. It does not offer legal advice or purport to treat all the issues surrounding any one topic.