Compliance Update

August 15, 2016

Review Your Cash-Out Plans

The IRS issued proposed regulations expanding on the previous guidance governing cash-out plans. The typical cash-out plan says that if the employee is otherwise eligible for the employer's group health plan, the employer will pay the employee additional taxable income for waiving coverage under the employer's group health plan. If the cash-out plan is not structured properly the plan can have a dramatic impact on the employer under health care reform. Large employers have to offer quality/affordable coverage to full-time employees or face a potential penalty. The coverage is considered affordable if the employee's share of single coverage does not exceed 9.5% (as indexed) of the employee's compensation.

If the cash-out plan is not set up correctly, the cash-out amount has to be included when determining the employees' share of the premiums. Say the employees' share of the premiums for single coverage is $100 per month. The employer establishes a cash-out plan where the employer will pay the employees $50 per month for waiving coverage under the employer's group health plan. If the cash-out plan is not set up correctly, when determining if the employees' cost of coverage is affordable (i.e. not greater than 9.5% of the employee's compensation) the $50 has to be included in the calculation. That is, the employer has to treat the employees as having to pay $150 per month for single coverage. On the other hand, if the cash-out plan is set up properly, the employees' cost of single coverage is only $100 per month when determining if the coverage is affordable.

Affordability Issues for Cash-Out Plans

PDF: Do IRS Opt-Out Rules Put Employers at Risk?

Proposed Rules Expand on Opt-Out Payments

Helpful Guidance Regarding Opt-Out Payments

PDF: Determining Affordability of Opt-Out Bonuses

Previously the IRS had indicated that the employee waiving coverage had to be covered under another group health plan (e.g. the spouse's group health plan). The new rules expand the type of coverage the employee has to have but now requires the employee and all of his or her tax dependents also have other coverage. The new rules are important, and you need to comply if you are offering employees cash to waive off your group health plan.

IRS Releases Draft IRS Forms 1094 and 1095

The IRS released advanced draft of the 2016 IRS Forms 1094 and 1095. The forms are used to report the employer provided health coverage for purposes of imposing the employer mandate or play or pay rules as well as the individual mandate.

2016 IRS Draft Forms and Instructions Released

The forms are a little bit simpler this year because some of the transitional rules expired. Note that the forms are in draft format and are subject to change.

How to Gather Social Security Numbers

Employers submitting IRS Forms 1094 and 1095 have to obtain the covered individuals' Social Security numbers. These articles talk about employers' obligation to gather those Social Security numbers.

IRS Clarifies Position on Incorrect Tax ID Numbers

Tax ID and Section 6055 Reporting

Proposed Adjustments in Individual Mandate Reporting

As the government becomes more automated over time the system should operate better. However, at least for now, the bulk of the compliance efforts fall on the employer.

How to Respond to Marketplace Notices

Federally facilitated marketplaces or health care exchanges (Ohio is one of them) are starting to send notices to employers telling them that one or more of their employees are getting a premium subsidy. This, in turn, means the employer may be subject to a penalty under the employer mandate or play or pay rules.

Responding to Marketplace Notices

PDF: Marketplace Notices - Should You Appeal?

PDF: Action Plan For Employers Who Receive Marketplace Notices

These articles explain the employer's options with respect to the notice. It is important to note that the notices are not an actual assessment of the penalty. They simply notify the employer that a penalty may be assessed later. In other words, if the employer elects not to respond to this round of notices that does not mean the employer is subject to the penalty.

Big Changes Ahead for Form 5500 Reporting

The government is proposing to revamp the annual reporting requirements applicable to welfare benefit plans (i.e. nonretirement employee benefit plans) and especially group health plans. The rules are scheduled to kick in for plan years beginning January 1, 2019.

Proposed Overhaul of Form 5500

Substantial Changes to Form 5500 Proposed

In addition to expanding the information that has to be reported, the most significant change would be that all group health plans would have to file the forms. Currently, insured plans with fewer than 100 participants (i.e. employees) on the first day of the plan year need not file the forms. That exemption would be eliminated for plan years beginning January 1, 2019, which means all group health plans would have to file the forms.

Tax-Favored Treatment in the Crosshairs

A lot of people are criticizing the 40% Cadillac excise tax, which is scheduled to take effect in 2020. The tax is imposed on the excess value of employer provided health coverage. Many are demanding the tax be repealed, but be careful what you ask for.

PDF: The Case for Preserving Tax-Preferred Status

Blog: Health Plan Could Disrupt Employer-Based Coverage

During an election cycle everything is on the table and it is not hard to imagine a tax change that limits or eliminates the tax-favored treatment of employer provided health coverage. It would not take a creative mind to develop a program that says, for example, the employer can deduct only $5,000 per year per employee for health coverage. Any amount above that threshold is not tax deductible. So, again, be careful what you ask for when demanding the Cadillac tax be repealed.

Fidelity Bond vs Fiduciary Insurance – Not Identical

Some people may confuse a fidelity bond with fiduciary insurance but they are not the same. ERISA requires that every fiduciary that "handles" the fund have a fidelity bond. The fidelity bond protects the plan from theft, etc. Fiduciary insurance, on the other hand, is coverage for the fiduciaries to protect themselves in the event they breach their fiduciary responsibilities with respect to the plan.

Fidelity Bond vs Fiduciary Liability Insurance

There is no statutory requirement but fiduciary insurance, but it is good idea for the fiduciaries to purchase the coverage and, in most cases, the cost of the coverage is not that great. Just do not confuse the two.

Increase in Noncompliance Penalties

A previous article talks about the expanded reporting requirements starting in 2019. The government is putting some real teeth in the rules by dramatically increasing the potential penalties for failing to comply.

PDF: Civil Monetary Penalties Increase

For example, the potential penalty for not filing a Form 5500 has increased from a maximum of $1,100 a day to over $2,000 a day! Therefore, it is imperative to pay attention to all the filing requirements and make sure your house is in order.

Check Your Workforce

Health care reform requires larger employers offer quality/affordable coverage to full-time employees or pay a penalty. Most of the time, it is pretty easy to determine whether an individual is an employee - he or she gets an IRS Form W-2. Sometimes it is not so easy.

Count Your Contingent Workers

More people are working as independent contractors and employers are using staffing agencies more often. Employers have to be careful that they classifying individuals properly. Just because the employer says the person is an independent contractor does not necessarily make it so. Misclassifying people can be very costly. Large employers that fail to offer coverage to 95% of the full-time employees are subject to penalty. Say the employer has 100 full-time employees and 50 "independent contractors" who are working 40 hours per week. The employer offers the 100 full-time employees health coverage but offers the "independent contractors" no coverage. If it is later determined those "independent contractors" were really employees, the employer has failed to offer coverage to 95% of the full time employees and would be subject to a substantial penalty under health care reform. So be careful!!!!!!!!

Count All Your Employees

The preceding article talks about the potential penalty for not offering health coverage to a sufficient percentage of full time employees. Don't forget about those employees enrolled in Medicare. Remember, there are two potential penalties under health care reform. One penalty applies if the employer does not offer health coverage to 95% of the full-time employees. The other penalty applies if a full-time employee goes to the exchange and receives a premium subsidy.

Impact of Medicare-Enrolled Employees

Some enrolled in Medicare cannot receive a premium subsidy so the second penalty would not be assessed for someone enrolled in Medicare. However, the employer cannot exclude those enrolled in Medicare when determine if the employer offers health coverage to 95% of the full-time employees. As a practical matter, the Medicare Secondary Payer Rules would require the employer to offer coverage to those on Medicare but employers should remember to count all full-time employees, including those on Medicare, when ensuring the employer offers coverage to at least 95% of the full-time employees.

New Investment Rules Have Little Impact on Welfare Benefit Plans

The government issued new ERISA rules governing fiduciaries that provide investment advice. However, most welfare benefit plans (i.e. health plans) do not accumulate funds and buy investments. So the rules have minimal impact on welfare benefit plans. However, it is conceivable (but unlikely) the rules could impact HSAs.

DOL Fiduciary Rule and HSA Administration

As a general proposition, HSAs are not covered under ERISA because they are really individual accounts owned by the employees. However, in the rare case when the HSAs are covered under ERISA (e.g. the employer provides investment advice), the new fiduciary rules could apply.

Employment Arrangements and ERISA

It is common for employers to enter into severance agreements with key employees when they part company. This article talks about the implication ERISA may have on those documents. Generally speaking ERISA covers "plans" and an agreement between the employer and one employee falls outside the definition of a plan for ERISA purposes.

Does Your Severance Trigger ERISA?

This article talks about this issue and the pros and cons of the arrangement being structured so that it does or does not fall under ERISA.