WINSTEAD

Planning for the Year Ahead in Benefits

Preparing for Employer Shared Responsibility Tax Reporting

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Reporting Coverage for Employees

The Internal Revenue Service ("IRS") recently issued the final instruction on reporting health coverage offered on Forms 1094-C and 1095-C (C is for "Coverage Offered, but it can be used by self-insured employer plans to also report medical benefits provided which otherwise would be reported on Forms 1094-B and 1095-B with B reminding us that is reporting Benefits provided). The final instructions provide a number of clarifications or reminders that the taxes related to this reporting are based on meeting safe-harbors or on coverage offered on a month by month basis.

The reporting requirements for 1094-C and 1095-C apply only to employers who are "Applicable Large Employers" who are subject to the Employer Shared Responsibility tax imposed under Code section 4980H. An applicable large employer is an employer who has 50 or more full-time employees or full-time equivalent employees on the average on business days in the preceding calendar year considering all entities in the controlled group including such employer. If an employer is not an Applicable Large Employer and it provides health coverage on a self-insured basis, it should not file/furnish the Forms 1094-C and 1095-C, but instead should file/furnish the Form s1094-Band 1095-B because it provided health benefits.

For employers with multiple separate legal entities within one Applicable Large Employer and employees who work for more than one of such entities, each separate entity would file the Form 1095-C for the months in which the individual worked for that separate entity unless one of such entities is not treated as the employer for an calendar month in the calendar year. However, if the employee worked for more than one of the entities within one calendar month, that employee must be treated as the employee of only one of the entities and must be reported by such entity for that calendar month and the other entity is not required to report that employee for that month. So if Parent company owns all of Sub A and Sub B and Joe works for both Sub A and Sub B in March 2015, Sub A or Sub B can report the coverage offered to Joe but both should not report the same coverage offered to Joe. If Sub A reports coverage offered to Joe for March 2015 , then Sub B is not required to report Joe for that month.

Reporting Coverage for Retirees and COBRA or other Non-Employees

Employers providing self-insured health coverage to non-employees (such as retirees or persons on COBRA or directors) may report such coverage on Forms 1094-B and 1095-B rather than Form 1095-C. If an employer reports coverage offered to non-employees

Qualifying Offer and 98% Offer Methods

The final instructions clarify that if an employer wants to use either of these reporting methods it must satisfy the requirements to use such method for all months in the calendar year. For the 98% Offer method which avoids counting the number of full-time employees and reporting this number each month, the employer must have offered affordable coverage providing minimum value to at least 98% of its full-time employees for whom it is filing a Form 1095-C and that if offered minimum essential coverage to the employees' dependents in each month in the calendar year. The employer is not required to identify which of the employees receiving the Form 1095-C is a full-time employee, but it must provide a Form 1095-C to every one of its full-time employees. The instructions remained substantially the same as in the draft form, but this is a safe harbor a number of employers are planning to use.

There was no change in the instruction for the column into which the full-time employee count for each month is to be inserted, but the column into which an employer must insert the total employee count may now count not only on the first or the last day of the month, but also on the first day of the first payroll period that starts during the month or on the last day of the first payroll period for the month. These additional dates may provide additional flexibility to match counts of full-time employees with actual periods when the payroll system has determined they are a current employee entitled to payment.

The definition of whether there was an offer of coverage to a spouse was added and provides that for reporting purposes (because there is no penalty for not offering a spouse coverage currently) an offer of coverage to a spouse that is available to a spouse only if that spouse certifies that he/she does not have access to health coverage from another employer still counts as an offer of coverage to the spouse for reporting purposes, but this is only for reporting and generally will not impact the spouse's eligibility for the premium tax credit if the spouse did not meet the condition and did not have an actual offer of coverage.

Due to the extensive coding and new information that must be gathered each month in the year to prepare these new reports, human resources departments should be coordinating with the tax and IT departments or with the applicable vendors to ensure that the data is being captured to complete the reports. It is important to plan to capture the data that will fit the alternatives the employer plans to use in reporting and in planning to minimize its payment of employer shared responsibility taxes.

New Limited Temporary Small Employer Safe Harbors for Offering Certain Health Insurance Reimbursement Accounts

Employers with fewer than 50 full-time employees and full-time equivalent employees combined may utilize the limited relief from the Affordable Care Act ("ACA") penalties for failure to comply with the benefit mandates if they are providing employees with an account to reimburse their health insurance premiums, or Medicare Part B or Part D premiums. The relief from the penalties is only applicable to such small employers who sponsor such employer payment plans under IRS Notice 2013-54 which are accounts with a set dollar amount provided by the employer to reimburse the health insurance premiums, Medicare Part B or Part D premiums paid by the employee. This relief will end after June 30, 2015. This means a small employer that qualifies for the relief but who does not discontinue the health insurance reimbursement account and continues to offer it after June 30, 2015 will be subject to the $100 per day per person tax penalty for a violation of each of the standards or mandates under health reform for group health coverage. For example an account that provide $6000 toward an employee's insurance costs would not comply with the required coverage of (1) preventive care with no cost sharing (is this one standard violated or multiple?), (2) the limit on out of pocket maximum on costs borne by the employee,(3) the mandate to cover certain clinical trials, (4) the prohibition on no lifetime dollar limit on benefits, *et al,* and no annual dollar limit on essential health benefits, and as a start this would mean at least 4 violations for each person, and possibly more, times $100 times the number of persons covered times the number of days such violations continue. So if there were just 4 standards and the plan had 50 participants, spouses and dependents covered and the violation continued for 10 days, the penalty would be $200,000 ($100 x 50 x 4 x10).

However, this relief will not protect stand-alone health reimbursement arrangements or other arrangements to reimburse medical expenses other than health insurance premiums. So any health expense reimbursement accounts that are not tied to health insurance coverage or that are not limited to only reimbursing health insurance premiums will not be protected from the penalty assessments by this limited transitional relief.

There is also a special rule for certain health care reimbursement accounts for 2 percent shareholders in S-corporations. The special rule for the 2 percent shareholders in S-corporations does not have an expiration date currently and will continue until additional guidance provides otherwise.

Recent Retiree Medical Litigation Following the U.S. Supreme Court's Decision in *M&G Polymers USA, LLC v. Tackett*

Much has been made in the press recently regarding every instance of retiree medical plan litigation. It is important to remember that not all retiree medical promises stand on equal footing. The retirees in *Tackett* were members of a collective bargaining unit covered by a collective bargaining agreement that provided for retiree medical coverage. The collective bargaining agreement had a termination date.

The courts have long treated promises of retiree medical coverage that were not contained in collective bargaining agreements or in merger agreements differently than those that were provided for in a collective bargaining agreement. So remember to look at the facts closely, because some of the recent decisions were looking at promises made to executives as employees of a union, not members of collective bargaining units, or that were allegedly covered by a corporate transaction agreement. Not all claims are created equally.. For a further discussion of the implications of the *Tackett* case and written materials looking at the different treatment historically of cases dealing with different types of

retiree medical promises, there will be an ALI-CLE teleconference on March 11. For additional information on registration for the teleconference, see http://www.ali-cle.org/index.cfm?fuseaction=courses.course&course_code=TSWY14.

Evolving Families and Beneficiary Designations

As time passes, we frequently see family units develop, change and evolve or dissolve. Often employees do not remember that as their family unit changes, so also should their benefits, benefit elections and beneficiary designations. Several recent cases remind us that it is important to keep beneficiary designations current and to make certain that managers know to tell the employees to report such changes promptly to HR to protect the employee's, spouse's and dependent's rights. Employers trying to reduce litigation costs related to benefits should consider (1) regularly reminding employees to update their life, accident, and retirement plan beneficiary designations and (2) establishing internal human resources or benefits procedures to trigger reminders to the employees or HR department when notification is received of a family change that may also impact other benefits. For example, it an employee notifies the employer to drop his spouse from coverage, the employer could remind the employee that his life insurance beneficiary and retirement plan beneficiary designations should be updated..

Maintaining accurate records of to whom the employee is married is important for determining rights under retirement plans and ensuring that consents or waivers are obtained when required and that notices are provided to the appropriate persons in a timely manner. That same information is important for life and accident beneficiary designations and for timely providing COBRA notices, and determining whether an employee's elections can be changed for benefits under the cafeteria plan rules. Employees may not realize all the parties to whom the information should be provided if they do not receive guidance to provide the information to all of the relevant areas of the employer, including whomever handles emergency contact information for employees.