WINSTEAD

IRS Confirms ACA Tax Assessable Payments are Still in Effect

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Even though an executive order (EO) was issued earlier this year directing the federal government agencies to minimize the burdens of the Patient Protection and Affordable Care Act (the ACA), the IRS has confirmed in two letters from the Office of Chief Counsel that the law has not been changed by the EOs. The statutes and regulations implementing the employer shared responsibility assessable payment and the individual mandate are still in effect and have not been changed.

Office of Chief Counsel letter number 2017-0010 issued on April 14, 2017 clarifies that an applicable large employer is still subject to the employer shared responsibility payment if it fails to offer coverage to a sufficient percentage of its full-time employees in 2017 or if it has a full-time employee obtains coverage on the insurance marketplaces and receives assistance or a tax credit and the employer's coverage is not affordable or did not provide minimum value. In letter number 2017-0011, to a member of the U.S. House of Representatives, the IRS clarified that coverage under the German government health system does not constitute minimum essential coverage because it does not qualify as an expatriate health plan for the individual in question living in Florida because it is not provided to a qualified expatriate for their work in the U.S., since the coverage is provided by the government to the German citizens. This meant the individual would be subject to the individual mandate and would not be treated as having minimum essential coverage if the only coverage they maintained was the German government coverage.

On June 20, 2017, we received letter number 2017-0017 to continue the story. It addressed whether the individual mandate tax under Code section 5000A is still applicable. The individual mandate tax applies if the individual does not have health coverage that constitutes minimum essential coverage and the answer is Yes!

The bottom line is the EO did not change the statute or the regulations and the IRS Chief Counsel's letters confirm this fact. The IRS is charged with enforcing the tax statutes enacted by Congress and those have not been changed by a new law enacted by Congress. So until there is relief from new legislation which changes the tax laws, the ACA's employer mandate tax and individual mandate taxes are still in effect. Likewise, there has been no statutory change removing the employer's obligation to report offers of health coverage or actual coverage (for self-insured plans) and employers subject to the reporting requirements should prepare to comply and report for 2017 on Forms 1095-C and 1094-C, unless reporting relief is enacted (to date neither of the major bills have provided such relief).

No EO has attempted to remove any of the other coverage or benefit mandates and the agencies enforcing those requirements would be in a similar position to the IRS, so employers should wait and watch for statutory changes for relief from statutory requirements or benefit mandates before altering their plan's mandated benefits. Other benefit changes enacted should be considered such as the change in the 21st Century Cures Act enacted late last year and discussed in a prior alert.

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