

2016 Affordable Care Act Update

September 16, 2016

Special Report

HIGHLIGHTS

- IRS Releases Draft Reporting Forms
- Excise Tax Relief
- Contraceptive Religious Accommodation Still Unsettled
- Reimbursement Plan Transition Relief
- Expatriate Plan Clarification
- Health Care Exchanges

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The Affordable Care Act in 2016: Reporting Changes, Excise Tax Relief, and Other Developments

Developments have continued at a good clip over the past year for the Affordable Care Act (ACA). The IRS is proposing reporting form changes for 2016. Congress has provided some welcome excise tax relief, narrowed the definition of “employee” for purposes of determining applicable large employer status, and clarified the status of expatriate health plans. In the regulatory field, the government is still searching for the right balance with respect to the religious employer accommodation for providing contraceptive coverage. Market reform transition relief largely expired last year, but transition relief is still available under some circumstances. Marketplace exchange rules have been tightened somewhat to reduce the availability of special enrollment periods.

New Draft Forms for Employers and Coverage Providers

Applicable large employer members (ALEMs) and health coverage providers now have at least one year of Affordable Care Act (ACA) reporting under their belts, and have hopefully recovered enough to start thinking about next year’s filing season. Recently, the IRS released draft forms and instructions for 2016 reporting.

COMMENT: Note that draft forms are provided by the IRS as a courtesy and subject to change. Do not rely upon these forms before final versions are released.

- Forms 1094-B and 1095-B (Code Sec. 6055): Used by anyone that provides “minimum essential coverage” (i.e., medical coverage) to an individual during a calendar year, to support enforcement of the individual mandate. Code Sec. 6055 is generally applicable to entities such as insurance carriers, but self-insured employers may also be responsible for filing Code Sec. 6055 reports.

- Forms 1094-C and 1095-C (Code Sec. 6056): Used by ALEMs to report whether and what kind of coverage was provided to employees. Even if an ALEM does not offer coverage to any, or only some, of its full-time employees, it must file returns with the IRS and furnish statements to each of its full-time employees to report information specifying that coverage was or was not offered. This information is used to determine (1) whether an employee is eligible for a tax credit if they purchased their coverage on the Exchange, and (2) whether the ALEM is subject to a penalty under the employer shared responsibility provisions. Some employers may be subject to reporting under both Code Sec. 6055 and Code Sec. 6056. Those employers will report the information required by both sections on a single combined “C” series form.

COMMENT: The format for this information reporting is similar to other information reporting that many employers are already familiar with, such as Forms W-2 and Form W-3. Each employee or covered individual is furnished with a form (Form 1095-B or C) and then a copy of each of those forms, along with a transmittal form (Form 1094-B or C), is filed with the IRS.

Employers and health insurance carriers were able to take advantage of a small extension to furnish and file forms in 2016 for the 2015 plan year. No such extension currently exists for the 2016 plan year. 2016 Forms 1095-B and 1095-C must be furnished to individuals by January 31, 2017. 2016 Forms 1094-C and 1095-C are required to be filed by February 28, 2017, or March 31, 2017, if filing electronically.

While the updates are fairly minor, there are some changes reporting entities ought to be aware of.

Changes to Form 1095-B

- Part I, lines 2 and 3, and Part IV, columns (b) and (c) were updated to reflect the rule that a taxpayer identification number (TIN) may be entered in place of a social security number (SSN);
- Form 1095-B, line 9 is now reserved—on the 2015 form, this line was used to report the SHOP identifier, if applicable;
- The instructions to the form's heading to Part II was revised to read "Information about Certain Employer-Sponsored Coverage" to clarify that Part II will be blank for some individuals with employer-sponsored coverage and reassures individuals that they do not need to take it upon themselves to fill out that section or return the form to the employer.

Form 1094-B, the transmittal form for Form 1095-B, is unchanged.

DRAFT FORM 1095-B

DRAFT FORM 1094-C

DRAFT FORM 1095-C

Changes to Form 1094-C

- In Part III, column (b), "Section 4980H" was inserted before "Full-Time Employee Count for ALE Member" to remind filers that the Code Sec. 4980H definition of "full-time employee" applies for purposes of this column, not any other definition that an ALEM may use for other purposes;
- Line 22, box B is designated "Reserved".

COMMENT: Line 22, Box B was previously the "Qualifying Offer Method Transition Relief", which is not applicable for 2016. Several forms of transition relief were available to employers for 2015, but only limited transition relief continues to apply in 2016, and they apply only for certain ALE Members and only for certain calendar months in 2016 (for example, for employers with non-calendar year plans).

Changes to Form 1095-C

- The language "Do not attach to your tax return. Keep for your records" was inserted under the title of the form to clarify that recipients should not submit Form 1095-C with their return;
- The "Plan Start Month" box will remain optional;
- Code 1I for line 14 ("Qualifying Offer Transition Relief 2015") is no longer applicable and has been reserved;
- Code 2I for line 16 ("Non-calendar year transition relief applies to this employee") is no longer applicable and has been reserved;
- New codes 1J ("Minimum essential coverage providing minimum value offered to you; minimum essential coverage conditionally offered to your spouse; and minimum essential coverage NOT offered to your dependent(s)") and 1K ("Minimum essential coverage providing minimum value offered to you; minimum essential coverage conditionally offered to your spouse; and minimum essential coverage offered to your dependent(s)") have been added for line 14.

COMMENT: In 2015, codes 1J and 1K did not exist. All offers to an employee's spouse were reported the same, whether or not the offer was conditional. A conditional offer is an offer of coverage that is subject to one or more reasonable, objective conditions (for example, an offer to cover an employee's spouse only if the spouse is not eligible for coverage under Medicare or a group health plan sponsored by another

employer). A conditional offer generally would impact a spouse's eligibility for the premium tax credit under section 36B only if all conditions to the offer are satisfied (that is, the spouse was actually offered the coverage and eligible for it). To help employees and spouses who have received a conditional offer determine their eligibility for the premium tax credit, ALEMs should be prepared to provide, upon request, a list of any and all conditions applicable to the spousal offer of coverage.

APPLICABLE LARGE EMPLOYER DEFINITION

Only applicable large employers are subject to the employer shared responsibility provisions of ACA. Under recent legislation, individuals who have medical coverage under the TRICARE program or the Veteran's Administration are not considered "employees" in determining whether an employer meets the 50-employee threshold to be an applicable large employer (Code Sec. 4980H(c)(2)(F)).

EXCISE TAX RELIEF

Congress has provided temporary relief regarding three ACA excise taxes:

- The start date for the 40 percent excise tax on high-cost employer-sponsored health coverage under Code Sec. 4980I (the "Cadillac plan tax") is postponed from tax years beginning after December 31, 2017, to tax years beginning after December 31, 2019. In addition, when the tax does go into effect, the cost of the tax may be taken as a deduction.
- For 2017 only, there is a one year moratorium on the annual fee on health coverage providers imposed by Act Sec. 9010 of the ACA. The fee will resume after December 31, 2017. This moratorium does not affect the filing requirement and payment of these fees for 2016. Form 8963 (Rev. February 2016) must be filed by April 18, 2016.

- The excise tax on sales of medical devices has been suspended for a two year period, for sales on or after January 1, 2016, through 2017.

EXPATRIATE HEALTH COVERAGE

Expatriate Health Coverage Clarification Act of 2014 (Div. M, P.L. 113-235) provides that the ACA generally does not apply to:

- (1) expatriate health plans;
- (2) employers with respect to expatriate health plans but solely in their capacity as plan sponsors of these plans; and
- (3) expatriate health insurance issuers with respect to coverage offered by such issuers under expatriate health plans.

The ACA continues to apply to expatriate health plans with respect to the employer shared responsibility rules of Code Sec. 4980H, the reporting requirements of Code Secs. 6055 and 6056, and the excise tax provisions of Code Sec. 4980I. Expatriate health plans can satisfy individual shared responsibility requirements either as an eligible employer sponsored plan or as a plan in the individual market depending on the arrangement.

COMMENT: *Until further guidance, expatriate health plans do not have to comply with the market reforms as long as they continue to comply with the pre-Affordable Care Act group plan rules. For purposes of this relief, an "expatriate health plan" is an insured group health plan with respect to which enrollment is limited to primary insureds who reside outside of their home country for at least six months of the plan year and any covered dependents, and its associated group health insurance coverage (Notice 2015-43).*

The Expatriate Health Coverage Clarification Act specifically excludes expatriate health plans issued or renewed on or after July 1, 2015, from the ACA Section 9010 fee. The IRS has provided a special rule for expatriate health plans for the 2016 fee year. The rule provides one procedure for covered entities that file Supplemental Health Care Exhibits for 2016 in which they report direct

premiums written for expatriate health plans and include some or all of those direct premiums on their Form 8963, Report of Health Insurance Provider Information. A different procedure applies to a non-SHCE filer. Both procedures require the covered entity to attach to its 2016 Form 8963 a statement relating to premiums written for expatriate health plans that include various certifications (Notice 2016-14).

MARKET REFORMS

The market reforms are a technical set of coverage rules embodied in a massive set of regulations under Code Sec. 9815. These rules apply to most employer plans. Since their general application in 2014, they have proven to be relatively uncontroversial as ACA provisions go. A small portion regarding contraceptives, plus an implication for reimbursement plans from different small portions regarding cost sharing, have provided the most interest.

Religious Accommodation for Contraceptives Still Unsettled

Under the ACA market reforms, coverage without any cost sharing must be provided for a long list of preventive health services including contraceptives. The government allows religious non-profit employers and small for-profit employers with religious objections to avoid this mandate under a religious accommodation safe harbor. Under the accommodation, the employer does not have to contract, arrange, pay, or provide a referral for contraceptive services. However, the accommodation ensures that women enrolled in the employer's health plan receive full coverage for contraceptive services through the same issuers or third-party administrators that provide or administer the rest of their health coverage.

An employer can invoke the accommodation by self-certifying its eligibility using a particular form (EBSA Form 700) which it then provides to its health insurance issuer or third-party administrator. Alternatively, the employer can self-certify by providing certain information to the Department of

Health and Human Services without use of a particular form.

The U.S. Supreme Court, in *Zubik v. Burwell*, 136 S. Ct. 1557 (2016), considered claims that, even with the accommodation, employers' rights under the Religious Freedom Restoration Act were being violated by having to notify the government. Without deciding the issue, the Court noted that the government and the religious objectors agreed that it would be possible to fashion an accommodation that would not require notice from the objecting employers. Accordingly, the Court gave the government the chance to fashion such an accommodation.

As a result, the government is asking for input from interested parties on whether it is feasible for issuers to implement the accommodation without written notification, whether the issuer should be required to offer women the opportunity to enroll in contraceptive-only insurance policies, and whether the affected women should be required to take affirmative steps to enroll in those contraceptive-only policies rather than being automatically eligible for payments. The government is also asking for comments on alternative processes for self-insured plans.

Reimbursement Plan Transition Relief

The IRS has taken the position that an arrangement under which an employer pays the premiums for current employees' individual health coverage or reimburses them for such coverage violates the ACA market reforms that limit cost sharing. As a result, such a plan can cost an employer a \$100 per day per affected employee in penalties. Under transition relief for 2014 and the first half of 2015 for small employers, the IRS agreed not to assert the excise tax solely for violation of this rule.

This transition relief generally expired after June 30, 2015, but it continues to be available until further notice for payment or reimbursement arrangements for S corporation 2-percent plus shareholders. In addition, this relief has been extended to

colleges that employ students if the reimbursement arrangement is offered in connection with other student health coverage (insured or self-insured) for a plan year or policy year beginning before January 1, 2017 (Notice 2016-17).

Health Reimbursement Arrangements (HRAs)

Unlike premium reimbursement plans which are all but banned for arrangements that include more than one current employee reimbursement accounts aimed at co-pays and deductibles for employer health coverage are permissible under the market reforms. However, there are a lot of details that plans have to get right for that to work.

An HRA is allowed under the market reforms only if it is integrated with primary health coverage offered by an employer (whether the individual's employer or spouse's). An HRA is integrated with such coverage only if under the terms of the HRA, the HRA is available only to employees who are covered by primary group health plan coverage provided by the employer and that coverage meets the annual dollar limit prohibition.

An HRA available to reimburse the medical expenses of an employee's spouse and/or dependents (a family HRA) may not be integrated with self-only coverage under the employer's other group health plan. However, an HRA would be integrated if eligibility for coverage automatically applied only to individuals covered under the employer's other group health plan, so that eligibility for expense reimbursement would expand automatically if the employee changed coverage from employee-only coverage to coverage including a spouse and/or dependents (and vice versa, for example, if the employee changed coverage from family coverage to employee-only coverage).

The IRS has provided transition relief for this rule allowing employers to continue using an HRA that is available for the expenses of family members not enrolled in the employer's other group health plan

for plan years beginning before January 1, 2016. Furthermore, the IRS will not treat an HRA and group health plan that otherwise would be integrated based on the terms of the plan as of December 16, 2015, as failing to be integrated with an employer's other group health plan for plan years beginning before January 1, 2017, solely because the HRA covers expenses of one or more of an employee's family members even if those family members are not also enrolled in the employer's other group health plan (Notice 2015-87).

EXCHANGES

Employer-sponsored health care has remained stronger than expected under the ACA, but problems have developed in the individual marketplace exchanges where individuals go for subsidized coverage. Enrollment is less than expected especially among healthy individuals, which makes it hard for insurers to make money.

One specific complaint is that individuals have used special enrollment periods to buy coverage only when they find out they are sick. In response, Health Insurance Marketplace CEO Kevin Counihan announced before the close of open enrollment for 2016 that the special enrollment period rules were being tightened to clarify eligibility rules, increase enforcement, and eliminate a number of special enrollment periods including the one for tax season.

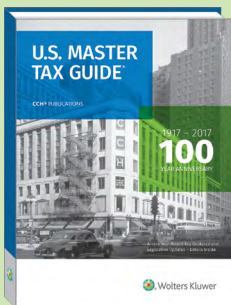
COMMENT. *Despite these changes, several major health insurers have announced they are pulling out from certain exchanges especially in less populated states. Insurers that specialize in low-cost basic Medicaid coverage are apparently doing reasonably well as they expand into the exchange environment, but their customers are limited to narrow provider networks.*

COMPLIANCE TIP: *Please check out the Health Care Reform topic on the Intelliconnect menu for newly added tools to assist in health care planning and compliance.*

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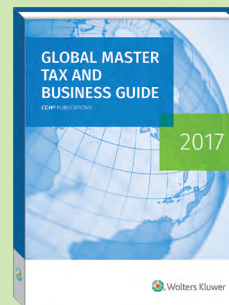
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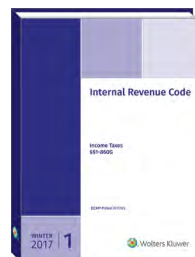
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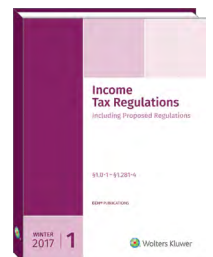
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