

CLIENT ALERT

Recent Guidance on Employer Payment Plans

On February 18, 2015, the Internal Revenue Service issued Notice 2015-17 (the “2015 Notice”), which provides excise tax transition relief for certain employers maintaining employer payment plans. The 2015 Notice also provides additional guidance on the one-employee health plan exception from the market reform provisions of the Affordable Care Act (“ACA”), Medicare premium reimbursement arrangements, TRICARE-related health reimbursement arrangements, and increases in employee compensation to assist with individual insurance policy premiums.

Background

In the fall of 2013, the IRS issued Notice 2013-54 (the “2013 Notice”), which provides, among other things, that health care premium reimbursement arrangements (referred to as employer payment plans (“EPPs”) in the 2013 Notice) are group health care plans and therefore are subject to the ACA market reform provisions, specifically the “no annual limit” and preventive services requirements. This conclusion meant that an employer that continued to operate an EPP following the effective date of the 2013 Notice (January 1, 2014) would be subject to ACA penalties of potentially up to \$36,500 per year, per participant and per violation, and would have to report and self-assess these ACA violations on IRS Form 8928.

Many employers who utilized EPPs to provide their workers with health care coverage thought that the 2013 Notice created ACA penalty exposure only if the premiums reimbursed under the EPP were pre-tax. These employers started taxing their workers on premium reimbursements, thinking that their ACA problems were eliminated. However, in November of 2014, several joint-agency FAQs were posted on the Department of Labor website, one of which said that taxing premium reimbursements did not, by itself, eliminate ACA penalty exposure.¹ Many employers thus found themselves facing potentially significant ACA penalties for 2014 and even part of 2015.

Excise Tax Relief for Small Employers

Under the 2015 Notice, an excise tax will not be imposed for a violation of the ACA market reform provisions by EPPs that pay or reimburse employees for individual health policy premiums or Medicare Part B or Part D premiums² (1) for 2014, for employers that are not

¹ See U.S. Dep’t of Labor, FAQs about Affordable Care Act Implementation Part XXII (November 6, 2014) available at <http://www.dol.gov/ebsa/faqs/faq-aca14.html>.

² The 2015 Notice clarifies that an EPP would also include an arrangement under which an employer pays or reimburses an employee for Medicare Part B or Part D premiums.

applicable large employers (“ALEs”)³ for 2014 under the ACA employer mandate; and (2) for January 1 through June 30, 2015, for employers that are not ALEs for 2015. The 2015 Notice makes it clear that employers eligible for the excise tax relief are not required to file Form 8928 with respect to 2014 ACA violations (or those that occur during the first half of 2015).

One question that has already arisen is whether premiums that were reimbursed under an EPP during 2014 and from January 1 through June 30, 2015 are taxable to participants. The IRS has informally confirmed that premium reimbursements for non-employer sponsored hospital and medical insurance would not be taxable to participants as long as such reimbursements satisfy the requirements of Revenue Ruling 61-146.⁴ Accordingly, if in 2014 an employer had taxed an employee on EPP reimbursements in an attempt to solve the ACA problem, the employer can amend the employee’s 2014 Form W-2 (if it wants to do that) and treat the reimbursements as pre-tax.

Importantly, in the 2015 Notice, the IRS reaffirmed the position originally expressed in Notice 2013-54 and subsequent guidance that an arrangement under which an employer pays or reimburses employees for medical care (including individual insurance policy premiums) is a group health plan subject to the ACA market reform provisions, regardless of whether the payments are made on a pre-tax or post-tax basis. Therefore, employers may be liable for the excise tax imposed on ACA violations after June 30, 2015 if they continue to maintain non-exempt premium reimbursement arrangements, even if they do not qualify as ALEs.

The One-Employee Health Plan Exception

The 2015 Notice confirms that an EPP with less than two participants who are current employees (a “one-employee health plan”) is exempt from the ACA market reforms and, therefore, is not subject to the excise taxes imposed under the ACA.⁵ The 2015 Notice also

³ An ALE is generally defined as an employer that employed an average of at least 50 full-time and full-time equivalent employees (as defined in the final employer mandate regulations) on business days during the preceding calendar year. Although it is not expressly stated in the 2015 Notice, it appears that the excise tax relief is not available to employers with more than 50 but less than 100 full-time and full-time equivalent employees that qualify for the 2015 transition relief from the employer mandate. For purposes of the Notice 2015 excise tax relief, an employer is permitted to determine its status as an ALE for 2014 and 2015 by reference to a period of at least six consecutive calendar months chosen by the employer during 2013 and 2014, respectively.

⁴ Those requirements are that the employer provide the employee with a check payable to the employee’s insurance company for the amount of the premium (or jointly payable to the employee and the insurance company) or, following receipt of proof that health insurance is in force and has been paid by the employee, reimbursing the employee for the amount of the premium.

⁵ The 2015 Notice provides that an employer that is an S corporation cannot set up a separate health plan for each of its employees and fall within the one-employee health plan exception. Although the 2015 Notice only addresses this rule in connection with S corporation reimbursement arrangements, the IRS previously informally indicated that this rule would also apply for purposes of EPPs. In addition, an employer with more than one employee that limits coverage under the reimbursement arrangement to only one employee may violate certain nondiscrimination requirements applicable to group health plans, so that premium reimbursements are taxable.

confirms that, pursuant to Revenue Ruling 61-146, premium reimbursement arrangements for non-employer sponsored hospital and medical insurance that are not subject to the ACA market reforms can be reimbursed on a pre-tax basis. We believe this would permit pre-tax reimbursements under a one-employee health plan and for excepted benefit coverage (e.g., limited-scope dental and vision benefits), although no express statement is made to this effect in the 2015 Notice.

Medicare Premium Reimbursement Arrangements

The 2015 Notice permits an employer to directly pay or reimburse employees for Medicare Part B or Part D premiums through an EPP that is “integrated” with another group health plan offered by the employer that complies with the ACA if the following requirements are satisfied:

- The employer offers a group health plan to the employee in addition to the EPP that does not consist solely of excepted benefits and that provides minimum value;
- The employee participating in the EPP is enrolled in Medicare Parts A and B;
- The EPP is available only to employees who are enrolled in Medicare Part A and Part B or Part D; and
- The EPP is limited to reimbursement of Medicare Part B or Part D premiums and excepted benefits, including Medigap premiums.⁶

TRICARE-Related Health Reimbursement Arrangements

The 2015 Notice states that an arrangement under which an employer pays or reimburses medical expenses for employees covered by TRICARE would also be a group health plan subject to the ACA market reform requirements. The 2015 Notice refers to these arrangements as TRICARE-related health reimbursement arrangements (“HRAs”). It appears that the 2015 Notice is also intended to provide the excise tax relief described above for TRICARE-related HRAs.⁷

The 2015 Notice permits an employer to establish a TRICARE-related HRA that is “integrated” with another group health plan offered by the employer that complies with the ACA if the following requirements are satisfied:

- The employer offers a group health plan to the employee in addition to the HRA that does not consist solely of excepted benefits and that provides minimum value;
- The employee participating in the HRA is actually enrolled in TRICARE;
- The HRA is available only to employees who are enrolled in TRICARE; and

⁶ The 2015 Notice warns that these types of arrangements may be subject to restrictions under other laws, such as the Medicare secondary payer provisions.

⁷ The actual text of the section of the Notice granting the excise tax relief does not extend that relief to TRICARE-related HRAs. However, the introductory paragraph of the 2015 Notice indicates that the excise tax relief is intended to apply to these types of arrangements.

- The HRA is limited to reimbursement of cost sharing and excepted benefits, including TRICARE supplemental premiums.⁸

Increases in Employee Compensation

The 2015 Notice confirms that an employer may increase an employee's compensation to assist with payments of individual insurance policy premiums and, as long as the payment of additional compensation is not conditioned on the purchase of health coverage, all ACA penalty issues are avoided.

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⁸ The 2015 Notice warns that these types of arrangements may be subject to other laws that prohibit offering financial or other incentives for TRICARE-eligible employees to decline employer-provided group health coverage.