A New Year Brings a Host of New ACA Guidance

The Internal Revenue Service (IRS) has released guidance on the application of market reforms to Health Reimbursement Arrangements (HRA) and employer payment plans, prevailing wage, the identification of employee contributions, Health Savings Account (HSA) rules' application to Veterans Affairs (VA) benefits, the application of COBRA rules to Flexible Spending Account (FSA) carryover amounts, and final regulations on minimum value and premium tax credit eligibility.

On December 16, 2015, the IRS released IRS Notice 2015-87 titled "*Further Guidance on the Application of the Group Health Plan Market Reform Provisions of the Affordable Care Act to Employer-Provided Health Coverage and on Certain Other Affordable Care Act Provisions.*"

In this notice, which is composed in a question-and-answer format, the IRS added commentary to some responses by the Departments of Treasury, Health, and Human Services and Labor, that clarifies several provisions of the Affordable Care Act (ACA) related to reporting penalty relief, application of market reforms to HRAs, employer payment plans (i.e., employer pays directly or indirectly through reimbursements for individual policies), identification of employee contributions where prevailing wage payments or flex credits apply, the application of HSA rules to persons eligible for VA benefits, and the application of COBRA rules to unused, carried-over FSA amounts.

On the same day, the IRS released final regulations on the ACA minimum value rules and other rules related to the premium tax credit, wellness incentives and employer contributions to an employee's HRA.

Highlights of both of these publications can be found below.

IRS Notice 2015-87

Penalty Relief for Incorrect or Incomplete Employer Reporting

Pursuant to 26 U.S. Code Sections 6721 and 6722, applicable large employers that can show that they have made "good faith efforts to comply" with the [Section 6056] information reporting requirements will not be subject to penalties for the 2015 tax year.

Market Reforms' Application to HRA, Cafeteria and Employer Payment Plans

The IRS previously addressed this topic in Notice 2013-54, which provided guidance on the application of certain provisions of the ACA to HRA, FSA and other employer-sponsored

health care arrangements. In Notice 2015-87, the IRS clarifies the following points covered in the previous notice related to HRAs and IRC § 125 cafeteria plans:

- An HRA with two or fewer participants that are not current employees is not subject to ACA market reforms and need not be integrated with an employee-sponsored plan.

- Former employees covered by such an HRA are ineligible for the premium tax credit as long as funds remain available in the HRA.

- Former employees previously covered under a current-employee, integrated plan may not use the remaining HRA funds to purchase individual policies.

- A family HRA available to cover medical expenses of an employee's spouse or children must be integrated with the coverage in which the dependents are covered and not employee-only coverage.

    - To facilitate employers transitioning to compliance with this rule, transition relief is available and an HRA will not be deemed noncompliant for plan years beginning before January 1, 2016, and the HRA will be considered integrated based on the plan in place on December 16, 2015, for plan years beginning before January 1, 2017.
    - The employer is responsible for Section 6055 reporting of minimum essential coverage for each individual for whom the HRA medical expenses cover who are not enrolled on the employer's group health plan.

- An HRA and employer payment plans may be used to pay for the premiums for HIPAA-excepted benefits (e.g., dental and vision plans).

- IRC § 125 cafeteria plans cannot be used to purchase individual coverage, even if fully funded by the employer.

- For purposes of determining the affordability of an employer-sponsored plan, employer contributions to the HRA are considered, thereby reducing the employee contribution amount before using one of the safe harbors to calculate affordability.

    - This rule only applies if the employer HRA contribution amount is required or determinable within a reasonable time before the employee must decide whether or not to enroll in the employer-sponsored plan.

- Employer flex credit contributions to a cafeteria plan can be used to reduce the employee contribution amount for purposes of determining affordability only if the flex credits or dollars can only be used for payment of medical coverage and care.

- Such “health flex contributions” cannot be cashed-out.

- “Non-health flex contributions” (e.g., used towards dependent care accounts and group term life insurance) cannot be used to reduce employee contribution amounts. Therefore, employers seeking to use flex credits and dollars toward the calculation of affordability must restrict use of some or all of the flex credits and dollars as well as prohibit cash-out options.

- Transition relief is available for coverage beginning before January 1, 2017, whereby employer flex contributions that are not health flex contributions because it may be used for non-health benefits (including non-taxable benefits and/or cash or another taxable benefit), but that may be used by the employee toward the amount the employee is otherwise required to pay for the health coverage, will be treated as reducing the amount of an employee’s required contribution.

    - This relief is not available with respect to a flex contribution arrangement offering non-health benefits that is adopted after December 16, 2015, or that substantially increases the amount of the flex contribution after December 16, 2015 (a “non-relief-eligible flex contribution arrangement”).
    - Solely for plan years beginning before January 1, 2017, an employer may reduce the amount of the employee’s required contribution by the amount of a non-health flex contribution (other than a flex contribution made under a non-relief-eligible flex contribution arrangement) for purposes of information reporting under § 6056 (line 15 of Form 1095-C).

- Opt-out payments available only when declining coverage will be added to the employees’ contribution for purposes of determining affordability.

    - The IRS is requesting comments on this issue and this rule is not effective until subsequent regulations are released. However, for purposes of eligibility for a subsidy in the exchange, taxpayers may treat unconditional opt-out payments as increasing the employee’s contribution and calculating affordability.

Prevailing Wage and Fringe Benefit Payments Required by Law

Employer payments for fringe benefits, including employer contributions to an HRA, health flex contributions and opt-out cash payments made pursuant to the McNamara-O’Hara Service Contract Act, the Davis-Bacon Act, or the Davis-Bacon Related Acts, or similar prevailing wage mandates, present difficulties for regulators. Additional regulations are expected on this issue. Until the applicability date of any further guidance, and in any event

for plan years beginning before January 1, 2017, these employer fringe benefit payments (including flex credits or flex contributions) will be treated as reducing the employee's required contribution for purposes of the employer shared responsibility mandate, but only to the extent the amount of the payment does not exceed the amount required to satisfy the requirement to provide fringe benefit payments under the prevailing wage mandate (even if alternatively available to the employee in other benefits or cash).

- Employers may treat these employer fringe benefit payments as reducing the employee's required contribution for purposes of reporting under § 6056 (Form 1095-C), subject to the same limitations.
- Employers are, however, encouraged to treat these fringe benefit payments as not reducing the employee's required contribution for purposes of reporting under § 6056 as it may affect the employee's eligibility for a tax subsidy.

Adjustments to Affordability Threshold and Employer Shared Responsibility Penalties

Year	Affordability Threshold	§4980H(c)(1) Penalty	§4980H(b)(1) Penalty
2014	9.5%	$2,000	$3,000
2015	9.56%	$2,080	$3,120
2016	9.66%	$2,160	$3,240

Indexed Thresholds Versus Affordability Safe Harbor Rules

There is a discrepancy between the indexed affordability thresholds (shown above) and the IRS affordability threshold percentage found in the employer shared responsibility safe harbor regulations. The IRS has provided guidance regarding this discrepancy. Until the IRS revises its formal guidance to match the affordability threshold safe harbor regulations and the indexed affordability threshold found in separate regulations affecting individuals seeking a premium tax credit, employers may choose to use either the indexed affordability threshold percentage reflected in the above box, or the 9.5 percent affordability threshold that is in the current employer shared responsibility safe harbor rule. The IRS states:

> *"The § 4980H(b) affordability safe harbors are intended to provide safe harbors with respect to the determination of the employee's household income as part of the affordability calculation because an employer generally will not have access to*
> *that information with respect to its employees. The safe harbors are not intended to otherwise alter the affordability calculation, and accordingly Treasury and IRS intend to amend the regulations under § 4980H to reflect that the applicable percentage in the affordability safe harbors should be adjusted consistent with § 36B(b)(3)(A)(ii), so that employers may rely upon the 9.56 percent for plan years beginning in 2015 and 9.66 percent for plan years beginning in 2016."*

Employers who choose to use the indexed threshold may experience a small benefit, allowing only a marginally higher employee premium amount. If using the higher indexed threshold of 9.56 percent, there would only be a 59-cent per month difference from the 9.5 percent threshold amount when calculating affordability for an individual making $50,000 a year.

Therefore, there is little benefit in choosing one over the other. Nevertheless, for now, employers are permitted to use either threshold percentages.

Hours of Service

Highlights of the notice's clarification of the definition of hour of service with respect to mechanical rules in the DOL regulations that do not fit into the general structure of the employer shared responsibility rules:

- An hour of service for purposes of § 4980H (i.e., the employer shared responsibility mandate) does not include any hours after the individual terminates employment with the employer.

- An hour of service does not include:
  - An hour for which an employee is directly or indirectly paid, or entitled to payment, or during a period which no duties are performed if made for the purpose of complying with workers' compensation, unemployment or disability insurance laws.
  - An hour of service for a payment which solely reimburses an employee for medical or medically related expenses incurred by the employee.
  - There is no 501-hour limit on the hours of service required to be credited to an employee on account of any single continuous period, during which the employee performs no duties. This limit only applies to educational organizations for purposes of employment break periods. A disability arrangement for which the employee paid with after-tax contributions would be treated as an arrangement to which the employer did not contribute, and payments from the arrangement would not give rise to hours of service.

The notice itself includes many helpful Q&A, as well as examples. It also includes more discussion on other issues such as how VA benefits will not result in ineligibility to fund an HSA in most cases, and that COBRA premium for FSA does not include carryover amounts under the COBRA rules. For complete details, see:

Notice 2015-87 supplements several pieces of guidance, including Notice 2013-54 and set XXII of the Frequently-Asked-Questions (FAQ) and Answers on ACA Implementation.

ACA Final Regulations Address Several Issues Including Employer Wellness Incentives, Minimum Value and Employer Contributions to an HRA

Employer Wellness Incentives

The final regulations retain the rules in the proposed regulations that wellness incentives unrelated to tobacco use are treated as unearned and wellness incentives related to tobacco use are treated as earned in determining affordability.

Employer Contributions to Health Reimbursement Arrangements

These final regulations clarify that:

- Amounts newly made available under an HRA reduce an employee's required contribution if the HRA would have been integrated with eligible employer sponsored coverage had the employee enrolled in the primary plan.

- An HRA is taken into account in determining affordability (and minimum value) only if the HRA and the primary eligible employer-sponsored coverage are offered by the same employer.

- HRA contributions are taken into account for affordability and not minimum value if an employee may use the HRA contributions to pay premiums for the primary plan only or to pay for cost-sharing or benefits not covered by the primary plan in addition to premiums.

- •Employer contributions to an HRA reduce an employee's required contribution (or count toward providing minimum value) only to the extent the amount of the annual contribution is required under the terms of the plan or is otherwise determinable within a reasonable time before the employee must decide whether to enroll.

Minimum Value

The rule finalizes a minimum value rule proposed in regulations released in May 2013 without change. Parts of the earlier proposed rules are finalized in this rule, while other parts remain to be finalized later. For assistance with minimum value calculations, see: Calculating Minimum Value.

Employer Contributions to Cafeteria Plans Using Flex Credits or Dollars

An employee's required contribution is reduced by employer contributions under an IRC § 125 cafeteria plan that:

- May not be taken as a taxable benefit.
- May be used to pay for minimum essential coverage.
- May be used only to pay for medical care within the meaning of IRC § 213.

Generally, employer contributions to an IRC 125 plan providing flex credit and/or HRA contributions reduce the employee's premium contribution in calculating affordability of the plan for purposes of the employer mandate. This would be the case only if the plan does not allow for cash-out and the benefits are for health coverage only (not for non-health benefits, such as long-term disability or group term life insurance). Contrastingly, opt-out payments will increase an employee's required premium contribution by requiring the employer to add any available opt-out payments to the employee's premium contributions when calculating affordability. Transition relief is provided in these latest regulations for both scenarios:

- Transition relief for flex credits is available for plan years beginning before January 1, 2017. Employers are permitted until then to consider flex credit contributions used toward health and non-health benefits as a reduction in an employee's premium contribution. Transition relief is only available for flex credit contribution arrangements that were in place on December 16, 2015 and that did not substantially increase flex credit contribution amounts.

- Transition relief permits employers to disregard opt-out payments when calculating affordability until final regulations are issued, unless the employer adopts an unconditional opt-out provision after December 16, 2015.
The above-mentioned notice also released on December 16, 2015 discusses HRAs and IRC §125 plans in much greater detail. See these regulations for complete details (link is found below).

Premium Assistance Subsidy and Coverage for Partial Months

The final regulations provide that the premium assistance subsidy amount for a termination month is the lesser of:

- The enrollment premiums charged (reduced by any amounts that were refunded).

- The difference between the benchmark plan premium and contribution amount for the full month.

The final regulations clarify that this computation also applies to a month an individual is enrolled in coverage effective on the date of the individual's birth, adoption, or placement for adoption or in foster care, or on the effective date of a court order.

The final regulations include a host of helpful explanations and examples. For complete details, see: https://www.gpo.gov/fdsys/pkg/FR-2015-12-18/html/2015-31866.htm. Also see additional supplemental guidance in set XXII of the Frequently-Asked-Questions (FAQ) and Answers on ACA Implementation.

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