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IRS ISSUES PROPOSED REGULATIONS ON PREMIUM TAX CREDITS AND AFFORDABILITY OF OPT-OUT PAYMENTS

On July 8, 2016, the Internal Revenue Service (IRS) published proposed regulations on the topic of premium tax credits and opt-out payments made to employees. As background, if an employer fails to offer Minimum Essential Coverage (MEC) to substantially all of its full-time employees, an employer may be exposed to penalties if one employee goes to the Marketplace and receives a subsidy. Second, even if an employer offers MEC to substantially all of its full-time employees, an employer may still be exposed to penalties if that employer fails to offer an employee Minimum Value (MV) and "affordable" coverage. A plan is considered affordable if the cost for self-only coverage for the lowest cost plan offered by the employer does not cost more than 9.5% (in 2016, the adjusted amount for inflation is 9.66%) of that employee's household income. If an employer fails to offer "affordable" coverage to an employee, an employer may be exposed to penalties if an employee purchases coverage within the Marketplace, and receives a subsidy. Employees are only eligible for a subsidy if they are not offered "affordable" coverage, and is the reason why it is important for employers to offer "affordable" coverage.

Opt-Out Payments

In previous guidance, employers who offered opt-out payments (i.e., payments of cash to the employee if he/she chose to waive coverage) to employees would have those payments be considered employee contributions to the plan, which would effectively increase the overall employee contribution to the plan (subject to transition relief). Therefore, a once "affordable" plan to the employee may become **unaffordable** to the employee due to the inclusion of the opt-out payment being added to the initial employee contribution of benefits. Below is an example:

Barney earns $8.50 an hour and his annual household income is $13,260, with a monthly income of $1,105. If Employer A calculates whether Barney's coverage is affordable, it would use his monthly income of $1,105, and multiply that times 9.5% (which has not been adjusted for yearly inflation). This would mean that Barney could not pay more than $104.98 towards self-only coverage for the lowest cost plan. Barney pays $100 towards the cost of his self-only coverage for the lowest cost plan offered by his employer, making the plan affordable to Barney, if the employer did not offer an opt-out payment to Barney. However, Employer A offers a $100 opt-out credit to Barney for waiving his coverage. Therefore, because of the opt-out credit, Barney would be considered by the IRS to have paid **$200** ($100 employee contribution + $100 opt-out payment) towards the cost of his self-only coverage for the lowest cost plan, making the plan **unaffordable** to Barney (since $200 is *greater* than the $104.98 that would have been considered affordable to Barney).

The proposed regulations state that an unconditional opt-out payment made to an employee by an employer would be considered an employee's contribution towards his/her benefits, which would increase an employee's overall contribution towards his/her benefits, potentially making such coverage unaffordable to the employee. However, the proposed regulations do allow an exception to this rule, if the employee is being offered an "eligible opt-out arrangement" as described below.

IRS Issues Proposed Regulations on Premium Tax Credits and Affordability of Opt-out Payments (Continued)

Eligible Opt-Out Arrangements

Employers may continue offering opt-out arrangements without the potential for creating an unaffordability issue, as described above, if the employer offers an "eligible opt-out arrangement" which is defined below. In order for an employer to be considered as having offered an "eligible opt-out arrangement," the opt-out arrangement must include **all** of the following elements:

- To receive the opt-out payment, an employee must decline to enroll in such coverage
- The employee must provide "reasonable" evidence that the employee (and all applicable individuals whom the employee expects to claim a personal exemption deduction for, i.e., tax family) has or will have Minimum Essential Coverage (*cannot* be coverage from the individual market, including from the Marketplace)

Reasonable evidence of alternative coverage may include an employee's attestation that the employee (and all applicable tax family members) has or will have Minimum Essential Coverage (other than coverage from the individual market, whether or not obtained through the Marketplace). Notwithstanding the previous sentence, an employer cannot provide the opt-out payment if the employer knows, or has reason to know, that the employee (or tax family) does not have, or will not have, the required alternative coverage, despite the attestation.

Finally, the employer must request this attestation (or other evidence of coverage) be provided to the employer at least every plan year for which the opt-out payment applies, and either as part of the regular open enrollment period, or soon after enrollment has already been completed. If an employee waives such alternative coverage mid-plan year, an employer may continue to treat such opt-out payments as non-employee contributions, until the end of the plan year.

As a reminder, employers should be cautious in offering these opt-out payments (regardless of whether they are eligible or non-eligible opt-out payment arrangements) to Medicare eligible employees. Employers should seek advice from legal counsel on this potential issue.

Action Required

Employers who offer opt-out payments to employees should ensure that those payments are being made pursuant to an "eligible opt-out payment arrangement," or they will potentially be exposed to penalties for failing to offer an affordable plan to employees. Employers should also be cautious when offering an opt-out payment arrangement to Medicare eligible employees.

For the complete details, see:

Proposed Regulations on Premium Tax Credits:

https://www.gpo.gov/fdsys/pkg/FR-2016-07-08/pdf/2016-15940.pdf

CHICAGO, ILLINOIS PASSES SICK LEAVE ORDINANCE

On June 22, 2016, the Chicago City Council passed the Chicago Minimum Wage and Paid Sick Leave Ordinance (Ordinance) which requires that employees working in the City receive paid sick time, in addition to an increased minimum wage rate. The Ordinance will take effect on July 1, 2017. The Ordinance requires that employees accrue up to 40 hours of paid sick leave in a 12 month period (beginning on the date the employee begins to accrue sick leave). This below article only focuses on the paid sick leave portion of the Ordinance.

Covered Employers

The Ordinance applies to all employers that employ at least one "covered employee" in Chicago, and:

- Maintain a business facility within the geographic boundaries of the city of Chicago; or
- Are subject to at least one of Chicago's business licensing requirements

If an employer is a covered employer under the Ordinance, even if that employer has only one employee working in the city of Chicago, the employer would need to provide sick leave time to that one employee under the Ordinance.

Covered Employees

All employees who work at least two hours within the geographic boundaries of Chicago in any two week period, and have at least 80 hours of total work in any 120-day period, are entitled to paid sick leave. The ordinance does not apply to construction industry employees that are subject to a collective bargaining agreement. In addition, for other employees who are subject to a collective bargaining agreement, the Ordinance will not impact any previous agreements reached as part of a collective bargaining agreement, and upon expiration of those collective bargaining agreements, employees may waive the Ordinance's requirement so long as such waivers are explicit.

Accrual of Leave Time

Covered employers must allow employees to **use** paid sick time by the 180th day after his/her date of hire, and may choose either of two methods in providing paid sick time to employees:

1. Accrual Method: Employees will accrue one hour of sick time for every 40 hours worked within the city of Chicago, which begins on the first calendar day after the employee's date of hire, or July 1, 2017, whichever occurs later. Employers may limit the total number of accrued paid sick leave hours to **40** hours in a 12 month period. At the end of a 12 month accrual period, the employee may carry over up to 20 hours of paid sick leave to the following 12 month accrual period.

   If an employer is a covered employer under the Family Medical Leave Act (FMLA), an employee may carry over up to an additional 40 hours of his/her unused accrued sick leave time, to the following 12 month accrual period (i.e., 60 hours total carryover if subject to FMLA). This additional 40 hours of eligible accrued leave may only be used for the purposes of FMLA leave.

2. Lump-Sum Method: Employees are granted the full **40** hours of paid sick time at the time of hire, or July 1, 2017, whichever occurs later.

Permitted Uses for Paid Leave Time

Employees may use paid sick leave for the following reasons:

- The employee/employee's family member is ill, injured, or is receiving medical care, treatment, diagnosis, or preventative medical care
- The employee/employee's family member is the victim of domestic violence or a sex offense; and
- A public official closes the employee's place of business because of a public health emergency, or the employee needs to care for a child after a public official closes a child's school or place of care because of a public health emergency.

A family member is defined as an employee's:

- Child (defined as: adopted child, step-child, foster child, or employee has an in loco parentis/legal guardianship with the child or grandchild)
- Spouse
- Domestic Partner
- Parent (Foster parent, step-parent, adoptive parent, legal guardian of employee, a person who stood/stands in loco parentis to the employee, or spouse/domestic partner's parent)
- Sibling
- Grandparent

Chicago, Illinois Passes Sick Leave Ordinance (Continued)

- Any other individual related by blood to the employee, who has a close familial relationship with the employee.

Employers cannot require an employee to find a replacement worker to cover his/her paid sick leave time.

Notice

When paid sick leave time is foreseeable, employers may require employees to provide up to seven days of advance notice to the employer. If such event is not foreseeable, an employee must give notice as soon as reasonably practicable. If an employee is absent for more than three consecutive days, an employer may require certification that the employee used paid sick leave for a reason under the Ordinance.

Employers must post notices regarding sick leave entitlement, in a conspicuous place at each work facility located in Chicago. If an employer has no work facility in Chicago, they are exempt from the posting requirement. Employers must also provide employees notice of their rights to paid sick leave with their first paychecks. The Commissioner for Chicago's Department of Business Affairs and Consumer Protection is preparing a form notice for employers, which will be made available at a later date.

Additional Protections for Employees

The Ordinance prohibits employers from taking retaliatory actions (e.g., reducing compensation, terminating an employee) or otherwise discriminating against employees from exercising their right to paid sick leave. If an employer violates the Ordinance, the employer may be subject to damages to the employee equal to triple the full amount of unpaid sick leave lost or denied with interest, and costs and attorneys' fees.

Action Required

Employers who have worksites/facilities in Chicago, Illinois should prepare to comply with the Ordinance prior to July 1, 2017 by amending any outdated leave policies and manuals. Employers should also be on the lookout for the Notice that is to be released by the Commissioner for Chicago's Department of Business Affairs and Consumer Protection.

For the complete details, see:

Chicago Paid Sick Leave Ordinance (PDF link can be found on this webpage):

http://sicktimechicago.org/ordinance/

IRS RELEASES INFORMATION LETTER ON ACA PENALTIES AND MEDICARE RECIPIENTS

The Internal Revenue Service (IRS) Chief Counsel released Information Letter 2016-0030 (Information Letter) on June 24, 2016 which provided guidance on how the Section 4980H payments (often referred to as Employer Mandate penalties) applied to employers and its Medicare eligible employees. As a reminder, IRS Information Letters are not binding authority, and cannot be cited as precedent. However, they provide general statements of well-defined law in response to requests for information by taxpayers or legislators. The Information Letter was written in response to a taxpayer's question asking whether an employer could be liable for Employer Mandate penalties of the Internal Revenue Code (IRC) if its employees worked over 29 hours per week (in violation of a company policy which restricts employees from working more than 29 hours per week), or if such employees are eligible for Medicare.

First, the Information Letter provided a brief overview of the Employer Shared Responsibility provision. Section 4980H of the IRC, as added by the Affordable Care Act, applies to employers who employed an average of 50 or more full-time and/or full-time equivalent employees in the preceding calendar year. An employer may be required to pay an assessable payment if it does not offer health coverage to its full-time employees (full-time employees provide an average of at least 30 hours of service per week, or 130 hours

IRS Releases Information Letter on ACA Penalties and Medicare Recipients
(Continued)

during a month), or the coverage offered does not meet minimum requirements (Minimum Value and Affordable coverage), and at least one full-time employee purchases coverage through the Marketplace and receives a premium tax credit.

Next, the Information Letter addressed the employee's question. Specifically, the employee explained that the employer implemented a new policy restricting part-time and seasonal employees from working more than 29 hours in a given week, and asked whether an employer could be liable under Section 4980H if an employee exceeded 29 hours of service in a week, and whether the Medicare eligibility of the employee would change that answer.

The Information Letter explained that if employees had an average of 30 or more hours of service during any given week, this could potentially trigger, or increase an employer's liability under Section 4980(a) of the Employer Mandate, regardless of whether the employee was eligible for Medicare. Alternatively, a full-time Medicare eligible employee could work an average of 30 or more hours in a week, but would not trigger payments under Section 4980H(b) if the employee did not purchase coverage on the Marketplace and/or did not receive the premium tax credit.

The Information Letter further discussed the issue of Medicare eligible employees receiving the premium tax credit. It concluded that an employer's failure to offer coverage to an individual who is both a Medicare recipient and full-time employee would not subject the employer to Section 4980H(b) payments (the penalty that is associated with failing to offer an employee Minimum Value/Affordable coverage). Section 4980H(b) payment is calculated as $3,000 times (adjusted for inflation) the number of employees that receive the premium tax credit, and because Medicare recipients could not receive the premium tax credit, they would not trigger an employer's Section 4980H(b) penalty.

Therefore, Applicable Large Employers should be cautious in failing to offer coverage to Medicare eligible employees who may be considered a full-time employee.

No Action Required

The Information Letter is available at:

https://www.irs.gov/pub/irs-wd/16-0030.pdf

SAN DIEGO, CALIFORNIA PASSES SICK LEAVE ORDINANCE

On June 7, 2016, a majority of San Diegans voted to approve the San Diego Sick Leave and Minimum Wage Ordinance ("Ordinance"). The San Diego City Council certified these results, and the Ordinance took effect on July 11, 2016. This Ordinance may sound familiar because it was originally proposed in August of 2014, but Mayor Kevin Faulconer vetoed the Ordinance. The Ordinance (now effective) requires employees who work in San Diego (City) receive paid sick time, in addition to an increased minimum wage rate.

Although the Ordinance recently took effect, amendments to the Ordinance are forthcoming ("Amended Ordinance"). This article focuses on the paid sick leave portion of the current, effective Ordinance, and the potential changes to certain requirements if the Amended Ordinance is approved.

San Diego, California Passes Sick Leave Ordinance (Continued)

Covered Employers

The Ordinance applies to all employers that "exercise control over the wages, hours and working conditions" of a "covered employee." The Ordinance does not specify that a "covered employer" must have an office/facility in the City, only that a "covered employer" employs at least one individual that works within the City.

Covered Employees

All employees who work at least two hours within the geographic boundaries of the City, for one or more calendar weeks of the year, are entitled to paid sick leave. The Ordinance does not apply to independent contractors, and certain other short-term and camp program employees.

Accrual of Leave Time

Employers must provide one hour of paid sick leave time for every 30 hours worked by an employee within the City (the Amended Ordinance would allow employers to cap accrued sick time at 80 hours). However, employers are not required to provide paid sick leave to employees in less than one-hour increments for a fraction of an hour worked. Employers with more generous sick leave or similar accrued Paid Time Off (PTO) policies need not offer additional leave to employees.

Employees begin to **accrue** sick time on his/her date of hire or July 11, 2016, whichever is later. Covered employers must allow employees to **use** paid sick time on the 90th day following his/her date of hire or July 11, 2016, whichever is later. The Amended Ordinance allows employers to "front load" an employee's sick time by providing an employee 40 hours of paid sick leave at the beginning of each benefit year.

Employers are also not required to pay out accrued, unused sick time when an employee separates from employment. However, if an employee leaves an employer, but is rehired within six months of the separation, the employee is entitled to reinstatement of his/her previously accrued sick time.

Use of Leave Time

Employers may set a reasonable minimum increment for use of accrued sick time, not to exceed two hours. Employers may limit an employee's **use** of paid sick time to 40 hours in a benefit year, but employees are permitted to carryover accrued, unused hours into the next year.

Employers may require up to seven days' advance notice of an employee's need to use accrued, paid sick time when the need is foreseeable, or as soon as possible when the need is not foreseeable. If an employee is absent for more than three consecutive days, an employer may also request reasonable documentation that the employee used the paid sick time for one of the permitted reasons under the Ordinance (listed below). However, an employer may not require an employee to find a replacement worker as a condition of that employee using paid sick time.

Permitted Uses for Paid Leave Time

Employees may use paid sick leave for the following reasons:

- The employee is physically or mentally unable to perform his or her duties due to illness, injury, or a medical condition
- The employee is obtaining professional diagnosis or treatment for a medical condition
- The employee has other medical reasons for an absence, such as pregnancy or obtaining a physical examination
- The employee is providing care or assistance to a family member with an illness, injury, or medical condition
- The employee uses Safe Time[1]
- The employee's place of business is closed by order of a public official due to a public health emergency; and
- The employee is providing care or assistance to a child (biological, adopted, step-child, foster child, child of domestic partner or employee has an in loco parentis/legal guardianship with the child), whose school or child care provider is closed by order of a public official due to a public health emergency.

A family member is defined as an employee's:

- Child (defined as: biological, adopted, or foster child, step-child, child of a domestic partner, employee has an in loco parentis/legal guardianship with the child)
- Spouse (including domestic partners recognized by the State of California)

[1] Safe Time includes time away from work that is necessary due to domestic violence, sexual assault, or stalking, provided the time is used to allow the employee to obtain for the employee or his/her family member one or more of the following: (1) medical attention; (2) services from a victim services organization; (3) psychological or other counseling; (4) relocation; or (5) related legal services.

San Diego, California Passes Sick Leave Ordinance (Continued)

- Parent (biological, foster, or adoptive parent, step-parent, legal guardian, a person who stood/stands in loco parentis to the employee)
- Grandparent
- Grandchild
- Sibling
- Child or Parent of Spouse

Notice

Employers must post a notice (which will be provided by the City) regarding sick leave entitlement in a conspicuous place at each work facility located in San Diego. The notice must be posted in English, and any language spoken by at least 5% of the employees at that job site.

Employers must also provide each employee, at the time of hire or by July 11, 2016, whichever is later, a notice of the employer's name, address, and telephone number, as well as the employer's responsibilities under the Ordinance. The employer must provide this notice in English and in an employee's primary language if it is spoken by at least 5% of the employees at the job site.

Employers who violate the notice and posting requirements may be subject to a penalty of $100 (the Amended Ordinance may raise this to $500) per employee who was not given appropriate notice, up to a maximum of $2,000.

Employer Records

Employers must maintain records documenting wages and employees' accrual and use of sick leave for at least three years.

Additional Protections for Employees

The Ordinance prohibits employers from taking retaliatory actions (e.g., threatening, disciplining, terminating, demoting, or reducing hours) against employees for exercising their right to paid sick leave. If an employer violates the Ordinance, the employer may be subject to damages to the employee, including back wages and reinstatement of employment, plus attorney's fees and costs, as well as civil penalties of up to $1,000 per violation. The Amended Ordinance provides for different penalties based on the type of violation, as well as increases some of the potential penalties.

Action Required

Employers who have employees in San Diego, California should review their PTO and/or sick leave policies and notices, and ensure they are in compliance with the Ordinance. Covered employers should also be aware that an Amended Ordinance is forthcoming, and may change their requirements, as well as the penalties they are subject to for violations.

For the complete details, see:

Current San Diego Earned Sick Leave Ordinance:

http://docs.sandiego.gov/council_reso_ordinance/rao2014/O-20390.pdf

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QUESTION OF THE MONTH

Summary of Benefits and Coverage Applicability Date Questions and Answers

The SBC instructions provide that: "Health plans and issuers that maintain an annual open enrollment period will be required to use the April 2017 edition of the SBC template and associated documents **beginning on the first day of the first open enrollment period that begins on or after April 1, 2017, with respect to coverage for plan years (or, in the individual market, policy years) beginning on or after that date**. For plans and issuers that do not use an annual open enrollment period, this SBC template and associated documents is required beginning on the first day of the first plan year (or, in the individual market, policy year) that begins on or after April 1, 2017."

1. A group health plan or health insurance issuer offers plans with an annual open enrollment period. When must it use the 2017 SBC?

   For a group health plan or health insurance issuer with an **annual open enrollment period**, applicability is based on the timing of the plan's (or, in the individual market, the issuer's) **open enrollment period**. Health plans with an **annual open enrollment period** are required to use the April 2017 edition of the SBC template and associated documents (referred to in this document as the "2017 SBC") beginning on the first day of any *open enrollment period* that begins on or after April 1, 2017. Qualified Health Plans (QHPs) offered through the Health Insurance Marketplace must use the 2017 SBC during the 2018 open enrollment period, which runs from November 1, 2017 – January 31, 2018.

2. A group health plans or health insurance issuer does not maintain an annual open enrollment period. When must it use the 2017 SBC?

   For group health plans or health insurance issuers without an open enrollment period, plans and issuers are required to provide the 2017 SBC beginning on the first day of the first plan year (or, in the individual market, the policy year) that begins on or after April 1, 2017.

3. When are issuers required to begin using the 2017 SBC for form review in States in which HHS is doing direct enforcement?

   For direct enforcement States, SBCs are considered forms by HHS. SBCs based on the 2017 template should be submitted for review at least 60 days prior to use, similar to other forms.

   Because States differ in their review of SBCs (e.g., some review them during form review, others may consider them to be marketing materials), issuers should follow applicable state guidelines for state enforcement activity with respect to SBCs where the State is enforcing SBC requirements.

4. What value should health plans and issuers enter on the Plans and Benefits template for "Treatment of a Simple Fracture"?

   Until further notice, to satisfy template validation requirement, issuers should enter default values of '$0" on the Plans and benefits template for each field under the third coverage example, "Treatment of a Simple Fracture." Also, for the foreseeable future health plans and issuers may continue to use the Coverage Example Calculator approved for Plan Year 2016 to calculate data for the SBC scenarios "Having a Baby" and "Managing Diabetes."

Contributing Source: EBIA Staff.

CONTACTS

Christopher K. Bao, Esq.
Manager, Employee Benefits Compliance
& Regulatory Affairs, MMA West
chris.bao@barneyandbarney.com
415.230.7224

Iris F. Chou, Esq.
Manager, Employee Benefits Compliance
& Regulatory Affairs, MMA West
iris.chou@barneyandbarney.com
949.540.6924

Brittany D. Botterill, Esq.
Manager, Employee Benefits Compliance
& Regulatory Affairs, MMA West
brittany.botterill@barneyandbarney.com
858.587.7511