Looking Ahead to 2015; Upcoming Amendment and Disclosure Deadlines; Minimum Value Calculation

Focus On Employee Benefits
12.01.2014

Featured in This Edition

- Health and Welfare: Winding Up 2014 and Looking Ahead to 2015
- Qualified Plans: Upcoming Amendment and Disclosure Deadlines
- Health and Welfare: IRS Notice 2014-69 Re: Minimum Value Calculation

Health and Welfare: Winding Up 2014 and Looking Ahead to 2015

Allison Rogers and Garrett Fenton

Without question, 2014 has already been one of the most active and eventful years for health care reform implementation since the enactment of the Patient Protection and Affordable Care Act (ACA) in 2010. With so much activity, there remain a number of year-end compliance items that employers may not have completed yet. Employers thus would be well-advised to ensure that they have addressed (or are prepared to address) these items.

- **Transitional Reinsurance Fee (TRF)**: By *December 5, 2014* (extended from November 15, 2014, as noted in our prior alert dated October 1, 2014), most self-insured group health plans (and health insurers, for fully-insured plans), must register and report their 2014 enrollment data on www.Pay.gov, in preparation for payment of the $63 per-enrollee TRF imposed for 2014. The U.S. Department of Health and Human Services (HHS) will invoice the employer (or insurer, as applicable) for the TRF, which can be paid either in a single lump-sum payment by January 15, 2015, or in two installments by January 15 and November 15, 2015, respectively (with the majority of the payment being due in the first installment). Self-funded employers should already be working with their third-party administrators or other vendors, as necessary, to assist in obtaining the relevant enrollment data to report on www.Pay.gov (and perhaps to assist in preparing the filing, itself).

- **FSA Carryover Feature**: As described in our prior alert dated November 5, 2013, employers may amend their cafeteria plan documents to allow employees to carry over to the following plan year up to $500 of unused health FSA contributions at the end of a given plan year. An employer that either provided for the carryover beginning with unused 2013 funds, or intends to provide for the carryover beginning with unused 2014 funds, must amend its cafeteria plan accordingly by *December 31, 2014*.

- **FSA Contribution Limit**: Effective for plan years beginning on or after January 1, 2013, the ACA limits to $2,500 (subject to inflationary increases) the permissible salary reduction contributions to an employee's health FSA. Despite the 2013 effective date, employers were given until *December 31, 2014*, to adopt a formal cafeteria plan amendment implementing this provision. Employers that have not already amended their cafeteria plans to reflect this salary reduction contribution limit must therefore do so by the end of the year. Notably, the IRS has announced that the maximum annual permissible salary reduction contribution will increase to $2,550 beginning in 2015.

- **Same-Sex Spousal Coverage**: With the status of same-sex marriages still in flux in many states, employers may want to take the opportunity at year-end to re-examine their policies on offering same-sex spousal health coverage, and determine if their plan documents, SPDs, and employee communication materials are accurate in that regard.

- **Employer Shared Responsibility (Pay-or-Play) and Reporting**: As described in our prior alert dated November 5, 2013, the ACA's pay-or-play and related employer reporting rules apply to most larger employers beginning in 2015. The pay-or-play provisions implicate myriad administrative and compliance issues for employers that wish to "play" (by offering approved coverage to a sufficient number of full-time employees and dependents) rather than simply "pay" an excise tax under Code section 4980H. Also by *January 1, 2015*, employers must be prepared to track certain data pertaining to employees and, for self-funded plans, dependents who are offered coverage, to ensure that they are able to comply with the ACA's health coverage reporting requirements beginning in 2015 (with the first reports issued in early 2016). For example, employers sponsoring self-funded plans (or perhaps their vendors, on their behalf) generally will need to collect Social Security Numbers (and the date of birth for use if the SSN is not provided) not only for their employees, but for all enrolled spouses and dependents.

- **Cafeteria Plan Permitted Election Changes**: The IRS recently announced that it would permit two additional status change events for employees currently participating in a group health plan through a cafeteria plan (other than an FSA) who wish to drop their coverage prospectively, mid-year, to enroll in other coverage -- namely, where either (1) the employee qualifies for and wishes to invoke a special enrollment period to enroll in coverage through the Exchange, or wishes to enroll in coverage during the Exchange's annual open enrollment period (which currently extends from November 15, 2014, through February 15, 2015, but may change for future years), or (2) the employee wishes to enroll in another plan that provides minimum essential coverage and previously worked (or was reasonably expected to work) at least 30 hours per week, but his or her hours were then reduced to less than 30 (even if the reduction in hours did not cause a loss of eligibility for the employer's health coverage). Employers that wish to implement either or both of these additional permitted election changes in 2014 generally must adopt a formal cafeteria plan amendment by *December 31, 2015*.

- **Health Plan Identifier Number (HPID)**: HHS recently delayed until further notice the requirement that most larger self-funded group health plans register and obtain from the agency, by November 5, 2014, an HPID (which is a unique 10-digit number) for purposes of identifying the plan in certain electronic transactions under HIPAA. Employers should stay tuned, because HHS is expected to issue further guidance on this issue in the future.

Qualified Plans: Upcoming Amendment and Disclosure Deadlines

Nick Wamsley and Elizabeth Drake

It is time again for plan sponsors of tax-qualified retirement plans with calendar year plans to review their plans to determine whether any year-end amendments are required and to provide necessary participant disclosures. The following should be helpful in guiding that review:

- **Changes in Plan Design and Plan Administration**. Employers generally need to amend their plans to reflect changes in plan design and plan administration by the end of the first plan year in which they become effective. Notably, however, certain changes (*e.g.*, the reduction of future benefit accruals and certain changes to 401(k) safe harbor plans) must be adopted in advance pursuant to specific statutory and regulatory requirements.

- **Amendments Arising from *Windsor* Decision**. IRS Notice 2014-19 provides that any plan rule applicable to married participants is equally applicable to participants in valid same-sex marriages. Additionally, qualified plans must recognize same-sex

marriages retroactive to June 26, 2013. Plans inconsistent with *Windsor*, Revenue Ruling 2013-17, and Notice 2014-19 (*e.g.*, plans defining marriage by referencing the Defense of Marriage Act (DOMA)) *must be amended by December 31, 2014*. Plan sponsors with documents that are not inconsistent with *Windsor* may nonetheless wish to consider adopting clarifying amendments. In all cases, participants should be notified of the implications of the *Windsor* decision.

- **Limitations Period on Benefits Claims**. On December 16, 2013, the Supreme Court in *Heimeshoff v. Hartford Life & Accident Insurance Co.* enforced a plan provision establishing an administrative period of limitations for a participant to file a court claim. In light of this decision, plan sponsors may wish to consider amending their plans to add time constraints on participants' ability to initiate claims (as well as to take legal action following the final claim disposition).

- **Cycle D Determination Letter Filers**. The current five-year cycle for Cycle D plans -- those plans sponsored by employers with tax identification numbers ending in 4 or 9 and multiemployer plans -- ends on January 31, 2014. The list of changes in plan qualification requirements applicable to Cycle D filers is set forth in Notice 2013-84.

- **Final Regulations on Cash Balance and Hybrid Plans**. The IRS issued final regulations implementing changes to rules governing cash balance and hybrid pension plans on September 19, 2014. Amendments to bring plans into compliance must be adopted prior to the first day of the plan year that begins after January 1, 2016.

Participant Notices. One or more of the following participant notices may be required before year-end:

- Qualified Default Investment Alternative (QDIA) Notice
- 401(k) Automatic Enrollment
- 401(k) Safe Harbor Notice
- Annual Participant Fee Disclosures
- Summary Annual Report

IRS Releases Cost of Living Adjustments

On October 23, 2014, the IRS released the cost of living adjustments applicable to retirement plans for the 2014 tax year. The limits applicable to qualified plans have all increased for the 2015 tax year except the Code section 415(b) defined benefit limits and the section 416 key employee limits, which are unchanged from 2014.

Health and Welfare: IRS Notice 2014-69 Re: Minimum Value Calculation

Allison Rogers and Garrett Fenton

On November 4, 2014, IRS issued Notice 2014-69 (Notice) announcing that a group health plan that does not provide substantial in-patient hospitalization services or physician services (or both) (a Non-Hospital/Non-Physician Services Plan) does not provide minimum value (MV) in accordance with the ACA, and on November 21, 2014, as noted below, HHS followed up with a proposed regulation to the same effect.

The ACA's employer mandate, under Code section 4980H, requires an applicable large employer to offer minimum essential coverage (MEC) to a certain percentage of its full-time employees (and dependents) that is affordable and provides MV. Employers who do not satisfy these requirements may be subject to one of two possible penalties. The first penalty (*i.e.*, the A Penalty) applies to an applicable large employer that does not offer MEC to the requisite number of full-time employees (and

dependents), and is generally equal to $2,000 annually for each full-time employee in excess of 30 (or 80, for 2015). The second penalty (*i.e.*, the B Penalty) applies to an applicable large employer that offers MEC but the coverage either is unaffordable or fails to provide MV, and is generally equal to $3,000 annually for each full-time employee who enrolls in coverage on the Exchange *and* receives a premium tax credit. Notably, in order to trigger either the A Penalty or the B Penalty, at least one full-time employee must enroll in coverage on the Exchange and receive a premium tax credit.

Implementing HHS regulations define MV as 60% of the total allowed costs of benefits under the plan as calculated under either the MV Calculator, safe harbors established by HHS or IRS, or if neither method is suitable because of a plan's non-standard features, certification by an actuary. The Notice indicates that certain promoters of Non-Hospital/Non-Physician Services Plans have asserted that such plans meet the MV standard based on the use of the online MV calculator.

Therefore, IRS issued the Notice to caution employers against adopting plans that technically satisfy the MV percentage but do not offer substantial coverage for in-patient hospitalization services or physician services. On November 21, 2014, HHS issued a proposed rule (likely to be finalized in 2015) that mirrors this guidance. *See* 79 Fed. Reg. 70673 (Nov. 26, 2014). Consistent with the Notice, the proposed regulation includes a transition rule if the employer, prior to November 4, 2014, relied on the MV calculator and either entered into a binding written commitment to adopt, or began enrolling employees into a Non-Hospital/Non-Physician Services Plan (assuming the plan year begins no later than March 1, 2015). HHS expects the Department of Treasury and IRS to issue proposed regulations clarifying that this delayed applicability date will apply solely for purposes of the 4980H penalty.

Finally, employers who offer such Non-Hospital/Non-Physician Services Plans (including employers who qualify for transition relief) must ensure that their disclosures do not state or imply that the plan offers MV and thereby precludes an employee from obtaining a premium tax credit on the Exchange, if eligible. To the extent an employer made such statements (*e.g.*, in a summary of benefits and coverage), the employer must timely correct the disclosure. Notably, if an employer offers a Non-Hospital/Non-Physician Services Plan in addition to another plan that provides MV (and is affordable), the employer may state or imply that the other plan offers MV and may prevent an employee from obtaining a premium tax credit, if otherwise eligible.

For more information, please contact:

Elizabeth Drake, edrake@milchev.com, 202-626-5838

Garrett Fenton*

Allison Rogers*

Nicholas Wamsley*

**Former Miller & Chevalier attorney*