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July 18, 2016

Washington Bulletin

A periodic update of legal and regulatory developments relating to Employee Compensation and Benefits

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1. Health Insurance Exchange Notices to Employers: To Appeal or Not to Appeal?

Employers are beginning to receive notices from public health insurance exchanges (also known as "marketplaces") informing them that certain employees have qualified for advance subsidies to purchase coverage through the exchange. The notices also give employers the opportunity to appeal this determination if they can demonstrate they offered "affordable" coverage that provides "minimum value" to the employee. But should employers appeal?

Background

When purchasing health insurance through a public exchange (also known as a marketplace) individuals may obtain premium tax credits and cost sharing reductions to help them afford coverage. Eligibility for these subsidies is based on a number of factors, including the members in the individual's household and the amount of household income. Most individuals claim subsidies in advance, with a true-up on their tax returns. Some individuals choose instead to pay higher amounts for coverage during the year and receive their full subsidies with their tax returns. A relatively small number of individuals who purchase coverage through an exchange are entitled to no subsidies at all. To obtain subsidies, individuals must not be eligible for employer-sponsored coverage that is affordable and meets the minimum value standard, and they must not enroll in employer-sponsored coverage (regardless of whether it is affordable or meets the minimum value standard).

The employer mandate tax, which applies with respect to the "full-time employees" of an "applicable large employer," is based in part on whether the full-time employees obtain subsidies to purchase coverage through a public exchange. The employer mandate tax is based on the actual subsidies the full-time employee is entitled to receive rather than the advances he has received, so the IRS must compare individuals' tax returns with the Forms 1095 and 1094 provided by employers, insurance companies, and others to administer the employer mandate tax. The due date for individual tax returns for a particular year generally may be extended until October 15 of the following year. Thus, IRS assessment of the employer mandate tax for a particular year generally cannot occur until fall of the following year at the very earliest. (The employer mandate tax is not self-assessed.)

Exchange Notice to Employers

Public exchanges are required to notify employers if individuals who identify themselves as the employer's employees obtain advance subsidies to purchase coverage. Both HHS and IRS have made clear, however, that the employer notices sent by the exchanges do not necessarily mean that an employer mandate tax will be owed by the employer. In this regard, the employer notices are unreliable for several reasons.

- They are based on information provided by individuals, who may provide an incorrect employer name, address, or other incorrect information.
- No attempt is made to confirm even the most basic elements of the employer mandate tax rules, such as whether the individual is a "full-time employee" or the employer is an "applicable large employer."

- More nuanced points, such as whether the individual is in a limited non-assessment period or if an affordability safe harbor applies for a particular month, are also not considered.

Moreover, the fact that an individual has received subsidies does not mean that he is actually entitled to them—he may discover when he files his tax return that he is required to repay some or all of these amounts. As explained above, the relevant data source for the employer mandate tax is the individual's tax return, so the information in the exchange notice, which may be sent more than a year in advance of the individual's tax return due date, is of very limited value from a tax perspective. By relying on a number of helpful provisions in the employer mandate tax rules, however, an employer should be able to determine whether it is shielded from the employer mandate tax with respect to a particular employee without relying on any information from an exchange.

Employer Appeals

Exchange notices provide employers with an opportunity to appeal the determination that an individual was entitled to advance subsidies. Although an employer will know if an individual has enrolled in the employer's health plan and whether the coverage offered meets the minimum value standard, it generally will not know whether the coverage is affordable under the premium tax credit rules (hence the affordability safe harbors in the employer mandate rules). In fact, it would be rare for any employer to be able to evaluate whether an employee is eligible for subsidies.

Failing to appeal an employee's subsidy eligibility determination does not undermine the employer's position with regard to its liability for the employer mandate tax in any way, and it has no effect on procedural aspects of tax administration, such as the statute of limitations.

For all of the foregoing reasons, there is no tax reason for an employer to appeal its employees' subsidy eligibility determinations. Employers may wish to consult with legal counsel to determine whether an appeal may be advisable for nontax reasons.

Other Ways for Employers to Use the Exchange Notice

Even if an employer determines that it will not appeal any of its employees' subsidy eligibility determinations, the exchange notices may help the employer to confirm certain aspects of its health plan administration and ACA compliance efforts. For example:

- If the exchange notice relates to an individual who has enrolled in the employer's health plan all year, then the employer may wish to contact the individual to discuss how that situation arose. The employer may be able to help the employee avoid having to repay a large subsidy amount at tax time.
- If the exchange notice relates to an individual who is not part of the employer's ACA compliance records, then the employer may wish to research whether the individual is a member of a class that was overlooked by mistake.
- If the employer unexpectedly receives exchange notices for a large number of employees in a particular division or geographic area, the employer may wish to

explore whether an administrative error has occurred that resulted in an inadvertent failure to offer coverage to those employees.

Because exchange notices will be sent to the address provided by individual enrollees, employers may wish to consider alerting their line managers and local HR and benefits teams that any exchange notices they receive should be forwarded to a central location—typically to the group handling ACA reporting.

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