Notice 2015-16

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HARRIS COUNTY, TEXAS

Human Resources & Risk Management
1310 Prairie, Suite 400
Houston, Texas 77002
Phone: (713) 755-3030 Fax: (713) 755-8869

David Kester, Director

May 15, 2015

Internal Revenue Service
VIA Email Notice.comments@irscounsel.treas.gov

Re: **Notice 2015-16**

We appreciate the opportunity to respond to the Request for Comments for Notice 2015-16, Section 4980I—Excise Tax on High Cost Employer-Sponsored Health Coverage.

Harris County, Texas is a local government entity and is the third largest county in the US. The County currently provides healthcare and related benefits to over 32,000 participants including active employees, retirees (under and over 65), COBRA beneficiaries and dependents.

While the healthcare law has provided opportunity to increase the availability of coverage for millions of Americans, rules and regulations implemented to fully enact the provisions of the law have significant impact on employers like Harris County, who have done their part to provide comprehensive benefits to their employees, dependents and long term employees who have retired. While the cost of coverage for many who had previously been uninsured may now be "affordable" due to the availability of exchanges and subsidies for both insurers participating in the exchanges as well as direct subsidies to individuals, the cost to employers, such as Harris County continue to increase due to mandates (limiting the flexibility in managing costs), lack of competition due to favored benefit rules and taxes imposed by the law. Forces outside the law such as new technologies, drugs and advanced treatment options compound our costs, and we are challenged to maintain an "affordable" plan for our members, while availing them to the best possible care.

We trust that you will review our comments carefully and exercise your regulatory authority in drafting these regulations with the goal of making quality healthcare available to our members at the lowest possible cost to both the employer and the individual member.

As requested, our comments will be focused on (1) the definition of applicable coverage, (2) the determination of the cost of applicable coverage, and (3) the application of the annual statutory dollar limit to the cost of applicable coverage.

Again, thank you for the opportunity to comment and I will be happy to clarify any of my comments or answer any questions that you may have.

Sincerely,

David Kester

David Kester, SPHR, CEBS
Director, Human Resources & Risk Management
Harris County, Texas

Definition of Applicable Coverage:

Regarding the definition of applicable coverage:

- We agree that applicable coverage should not include onsite medical clinics that offer only de minimis medical care, first aid or treatment of injuries caused by accidents at work to employees.

- The rules should specifically exclude costs relating to on-site medical clinics that offer programs that further good health, but do not relate to the relief or alleviation of health or medical problems. An example would be access to immunizations and injections of antigens. This would conform to IRS regulations defining "what is a group health plan" in §54.4980B-2.

- The rules should clarify that the cost of onsite medical clinics operated by a third party who services are billed through a group health plan are limited to the cost paid for by that group health plan.

- We agree that Treasury and IRS should exercise their regulatory authority under §4980I to propose an approach under which self-insured limited scope dental and vision coverage would be excluded from applicable cover §4980I.

- Employee Assistance Programs (EAPs) should unconditionally qualify as an excepted benefit and be excluded from the applicable coverage for §4980I. In addition to the exceptions included in IRS Bulletin 2014-43, EAPs typically provide services related to financial counseling, work-life balance, long-term care guidance and advice.

- Specifically clarify that Health FSA's only include the amount of employer contributions 4980I(d)(2)(B) and not voluntary employee salary reduction contributions. These accounts can be used for other "qualified" expenses not directly included in the plan as "essential health benefits." For example, the FSAs can be used for the purchase of eyeglasses, orthodontics, and over-the-counter medications. Further, some items may be taxed when purchased and would be subject to a second tax if required to be included in the applicable coverage category causing the cost of the plan to exceed the Excise Tax Threshold.

Determination of Cost of Applicable Coverage

1. The proposed determination of cost of applicable coverage appears to be similar to the rules applied for the purpose of determining applicable costs for COBRA. We would support the approach of maintaining similar rules under which a group of similarly situated employees would be determined by starting with all employees covered by a particular benefit package, then subdividing that group based on mandatory disaggregation rules (whether an employee is enrolled in "self-only" coverage or "other-than-self-only" coverage.) However, due to adverse selection (where a member with a higher than average claims cost chooses a plan with higher benefits), an employer's "high option" plan typically costs more than the average of all plans. Therefore, we would recommend an option to allow employers to average the cost of all plans when considering the threshold.

2. As a self-funded plan, Harris County currently utilizes the actuarial basis method for determining the COBRA applicable premiums. Support for adopting a similar approach to determining the cost of applicable coverage would be preferred, and providing clarification about the actual time period for which the cost applies would be beneficial.

3. While the options available under the proposed measurement period under the Past Cost Method (specifically for self-insured employers) could be considered, we take exception to some of the costs proposed. Specifically:

   - Premiums for Stop loss or reinsurance policies. These policies are subject to state tax and assessments. Should the total cost of applicable coverage exceed the threshold for the Excise tax, this would result in double taxation. Further, stop loss coverage is often "pooled" limiting the ability of the employer to control such cost.

   - Administrative expenses and ("reasonable") overhead expenses (such as salary, rent, supplies and utilities) of the employer are nowhere to be found in the definition of "health insurance coverage" as defined under 9832(b)(2). Further, though the language suggests that such costs would be "ratably allocated" to the cost of administering the employer's health plan, it would be literally impossible to "reasonably" determine whether a staff member is providing assistance to a member relating to the member's "health insurance coverage" or to an "excepted benefit" such as disability or a limited scope dental or vision benefit.

   - In terms of a potential "safe harbor" for self-insured plans for "reasonable" overhead expenses, the IRS should consider the Medical Loss Ratio under ACA of 85%, and allow up to 15%.

   - In terms of the calculation of the cost of claims, we would recommend claims paid during the measurement period. However, clarification and consideration must be made to account for returns, overpayments, and pharmaceutical manufacturer rebates, as well as the partial reimbursement of prescription drug costs for Medicare beneficiaries under the Retiree Drug Subsidy program under the Medicare Prescription Drug, Improvement, and Modernization Act of 2003 (MMA) Title I.

Applicable Dollar Limit

- Section 4980I(b)(3)(C)(ii) references a "health cost adjustment percentage" related to "the per employee cost for providing coverage under the Blue Cross/Blue Shield standard benefit option under the Federal Employees Health Benefit Plan for the plan year 2018 (determined by using the benefit package for such coverage in 2010) exceeds such cost for the plan year 2010...." Information relating to these costs and the methodology (including age and gender characteristics) should be published in order for employers to plan for the potential impact of this adjustment.

- In reference as to how an employer determines that an employee (who is retired) is not eligible for enrollment under the Medicare program, we have no way of making that determination. While we use the CMS data match to identify those who are enrolled in Medicare, there is no mechanism to determine if a retiree is eligible for Medicare.

- Will, and if so how will, the amounts for the adjustments for qualified retirees be increased? Based on current and past experience, this group's costs are significantly higher (more than the proposed allowable adjustment to the applicable dollar limit) and conversely increase at a higher rate than the employee population.

- Need to provide clarification as to whether the added dollar limit for a "qualified" retiree who also was an employee engaged in a high risk profession (for 20 years or more) would be considered for both an increased dollar limit as a "qualified" retiree and as an employee engaged in a high-risk profession.

- The proposed rules regarding high-risk professions should include public works employees, such as road and bridge/ flood control construction and maintenance workers. The Bureau of Labor Statistics includes various industry profiles that may assist in defining such employees under this provision.
  http://www.bls.gov/oes/current/oes472061.htm
  http://www.bls.gov/ooh/construction-and-extraction/construction-equipment-operators.htm#tab-7

- With regards as to how an employer determines that an employee was engaged in a high-risk profession for not less than 20 years, we suggest that if an employee retired in a position that met the definition at the time of retirement and was employed with the entity for not less than 20 years, that the employer should be able to assume the employee was in a qualified high risk profession unless the employer receives information otherwise. (Employers should be allowed to make a good faith determination).

- While there certainly needs to be consideration for age and gender adjustments, the Request for Comments suggests that these would be based on the "national" workforce, however, Section 4980I(b)(3)(C)(iii) states that the adjustment would be based on the Federal Employee Health Benefits Plan. Will the adjustments be based on the Federal Employee Workforce or the national workforce?

Possibility of Other Methods of Determining Cost of Applicable Coverage:

One of the challenges of being a self-funded, public entity employer is ensuring that "premiums" paid by the employer and contributions from employees, retirees and their dependents are sufficient to pay for the expected claims cost of the plan. As indicated, new technologies and the proliferation of bio-tech and other drug therapies since the inception of the health care law increase the uncertainty regarding the sufficiency of funding. Now, the possibility of paying an "excise" tax on top of necessary healthcare presents a dilemma for employers to either "cut" benefits or increase the cost to local taxpayers due to both the increase in healthcare costs as well as a threat of the excise tax.

Hopefully, the adjustment for the "high risk" professions as well as pre-Medicare retirees (most of whom are law enforcement officers), will mitigate the potential of added cost or cutting benefits.

Is there some creative way within your regulatory authority to allow plans additional consideration or exception for catastrophic claims such as a $1,000,000+ premature baby, a serious debilitating accident, or an unfortunate brain cancer which cannot be anticipated and often may not be preventable? Perhaps a multiyear option that would recognize and allow for such unforeseen spikes, or an option that would consider a plan's year to year experience, or some combination of those options could be considered in lieu of and/or in addition to a benchmark established and based on the mammoth Federal Employees Benefit Plan, which surely is helped by the law of large numbers.

Thank you again for your request and we look forward to working with you as these rules and regulations are finalized.