Notice 2015-16

TML MultiState
Intergovernmental Employee Benefits Pool

May 15, 2015

Internal Revenue Service
Attn: CC:PA:LPD:PR (Notice 2015-16)
Room 5203
P. O. Box 7604
Ben Franklin Station
Washington, DC 20044

Submitted via email to
Notice.comments@irscounsel.treas.gov

Re: Notice 2015-16

Dear Sir/Madam:

On behalf of TML MultiState Intergovernmental Employee Benefits Pool (IEBP) and its member municipalities and other political subdivisions, we are writing to comment on Notice 2015-16 regarding the proposed rules on the Excise Tax on High Cost Employer-Sponsored Health Coverage.

BACKGROUND

IEBP is a health benefits risk pool formed under Chapter 172 of the Texas Local Government Code to provide and/or administer medical benefits to the officials, employees, dependents, and retirees of over 800 political subdivisions of Texas and Oklahoma. Formed in 1979 and self-funded since 1989, IEBP has been formed through and acquires new members by means of interlocal agreements between the member local governments. The great majority of the members are municipalities.

OUR CONCERNS

IEBP is very concerned about the undue financial burden that the excise tax will place on local government employers. While the excise tax does not take effect until 2018, local government employers are disproportionately impacted by the excise tax due to state statutory requirements and/or collective bargaining agreements mandating benefit coverage for certain groups of employees or former employees, such as early retirees and/or police, fire, first responders, and EMS employees. These statutory requirements do not generally apply to private sector employers and can make it very difficult for local government employers to make benefit changes that would allow them to fall below the threshold, thereby avoiding the tax.

In addition, local governments are still recovering from the economic recession, and have done so at a much slower rate than private sector employers. IEBP is concerned that a 40 percent excise tax on the value of high cost plans will further impede the economic recovery that many local governments continue to face.

IEBP supports efforts and comments to reduce the disproportionate impact of the excise tax on local governments and to minimize the administrative burden on employers in calculating the tax.

COMMENTS

IEBP supports the comments submitted by the Association of Governmental Risk Pools. In addition, there are some key areas where the excise tax is likely to impact municipal employers – primarily in regards to retirees, treatment of HRAs, HSAs, and Health FSAs, and adjustment for high risk professions.

Retirees

Many states mandate continuation of benefits for public sector retirees, significantly impacting city health care costs. In addition, many public employers are legally bound to offer legacy retiree benefits which provide primary coverage. Retirees of such employers are not required and have no incentive to enroll in Medicare (even if they are eligible).

We support efforts by the Department to allow employers to consider early and post 65 retirees as similarly situated beneficiaries. We also support efforts to permit disaggregation based on a broad standard, providing administrative flexibility to employers. To the extent employers are permitted to disaggregate similarly situated employees for purposes of job categories, nature of compensation, geographic location, etc., they should be allowed to disaggregate early and post 65 retirees as similarly situated beneficiaries as well.

The Department has also asked whether additional guidance would be beneficial under Internal Revenue Code Section 4980I(d)(2)(A), which provides that "the plan may elect to treat a retired employee who has not attained the age of 65 and a retired employee who has attained the age of 65 as similarly situated beneficiaries." As noted, many states mandate benefit continuation for early and post 65 retirees. This is a significant issue and concern for many local governments and we encourage the Department to allow a plan to average the cost of employer-sponsored coverage for pre-Medicare retirees with the cost of similar coverage for retirees who are entitled to benefits under Medicare (where such employer-sponsored coverage may be limited to a Medicare supplement plan).

We agree with other comments encouraging the Department to allow employers to offset the typical high costs of pre-Medicare retiree coverage with lower cost Medicare supplement plans. This approach increases the likelihood that employers will preserve pre-Medicare retiree coverage (which was the main goal of the ACA's Early Retiree Reinsurance Program) and provides relief to public employers who are legally required to offer retiree health coverage under constitutional and statutory mandates or as required by collective bargaining agreements. Interpreting this language in a contrary manner is likely to wreak further havoc on the financially vulnerable budgets of state and local governments.

Treatment of Health FSAs and HRAs

Health FSAs

We encourage the Department to exclude from applicable coverage contributions to or reimbursements from limited-purpose Health FSAs. Limited purpose Health FSAs only allow for reimbursement of eligible dental and vision expenses that are not covered under a dental or vision plan. Dental and vision plans are often excepted benefits, which means they are not subject to many other provisions of the Affordable Care Act. Excluding limited-purpose Health FSAs from the cost of applicable coverage would provide consistency with a similar exclusion for limited-purpose HRAs and the exclusion of limited scope dental and vision plans from the Affordable Care Act.

HRAs

We also encourage the Department to issue guidance permitting employers to determine the cost of coverage for HRAs by using either the contribution approach (based on the amounts made newly available to a participant each year) or the claims approach (adding together all claims, but not administrative, expenses attributable to the HRA for a particular period). This will provide employers with the greatest flexibility to determine the least complicated and administratively burdensome for their plan. Requiring one or the other method for determining the cost of coverage for HRAs may be more complicated and administratively burdensome for employers and could result in greater cost variability from year to year.

We also encourage the Department to permit the employer to exclude from the cost of applicable coverage contributions to and/or reimbursements from limited-purpose HRAs, which are used to reimburse for excepted benefits such as dental and vision and/or for employee contributions towards coverage.

Comments are requested on whether the potential approaches described for purposes of determining the cost of applicable HRA coverage under § 49801 should apply for purposes of determining the COBRA applicable HRA premium. We recommend that when a monthly HRA contribution amount is determined for a 12-month determination period, and is determined before the beginning of such period, the actual monthly HRA contribution amount should be the amount used for purposes of determining the COBRA applicable premium.

Adjustments for High-Risk Professions

We support the issuance of further guidance on what constitutes an "employee engaged in a high-risk profession." We suggest that the Department specify in that guidance that public works employees and municipal utility workers qualify as individuals in the "construction" trade because they utilize heavy machinery, work in dangerous environments (e.g., roadways, elevated heights, and confined spaces that contain toxic gases and other hazardous materials), work during inclement weather (e.g., snow storms and hurricanes), and are sometimes required to work with electrical current.

In determining whether the majority of employees covered by a plan are engaged in a high-risk profession, we suggest that the Department allow employers to have multiple "plans" as long as each plan can be justified using bona fide business criteria. For example, an employer should be allowed to have different plans for specified job categories, hourly and salaried employees, geographic locations, union personnel, and similar bona fide business criteria.

Thank you for considering our comments. If you have any questions or would like to discuss these comments further, please do not hesitate to call me at 800-348-7879.

Sincerely,

J. Scott Wilson
In-House Counsel