

Notice 2015-52
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Notice 2015-16

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From: Erin Freiberg <emfreiberg@gmail.com>
Sent: Tuesday, September 15, 2015 4:04 PM
To: Notice Comments
Subject: Notice 2015-52 and Notice 2015-16

I am writing to comment on two items in the above-referenced Notices regarding the Excise Tax on High-Cost Coverage.

1) I urge the IRS to follow its inclination to consider account-based coverage (HSA, Archer MSA, HRA, and FSA) on a pro-rata basis over the coverage period (e.g., plan year) regardless of when the contribution is made.

To consider this type of coverage on a monthly contribution standard would result in severe unintended consequences. For an employer that offers an FSA, this would result in huge coverage totals in January (as all amounts must be available on the first day of the plan year), even though realistically employees are using these amounts over the entire plan year. Employers would be liable for the tax in January even if their major medical plan costs are well below the threshold. It provides disincentives for managing health care costs. To pro-rate over the plan year instead, will allow employers to adequately anticipate plan costs and excise tax liability.

2) I am concerned about the inclusion of an employee's pre-tax HSA contributions in the cost of employer-provided coverage (I do agree that in any case, money the employer contributes to an employee's HSA must be included).

I do not agree that the statutory language of Section 4980I requires inclusion of pre-tax employee contributions; the reference to section 106(d) relates to contributions made by employers to an HSA, but with no reference to section 125 it does not seem clear that Congress intended to include HSA contributions made by employees on a pre-tax basis via the cafeteria plan. I would therefore urge the IRS to resist including such pre-tax elections by the employee in the cost of coverage for the purpose of calculating the excise tax.

HSAs are owned by the employee, not the employer. Since the employee is able to either deduct the amount of after-tax contributions or have the amount automatically be untaxed when deposited (through pre-tax contributions), the taxation result is the same. Therefore the effect of including an employee's pre-tax contribution is really to deter lower and middle-income earners (who may be less able to shoulder a higher monthly tax burden and/or not be as educated about how to deduct taxed HSA contributions later) to contribute to (and possibly participate in) an HSA. The effect on higher educated and higher income earners is likely negligible (as they will be able to afford it and will see a benefit to it), so this seems almost regressive in nature and punitive to those who see the value in saving monthly, but need the help to do so. Although of course the IRS must follow the statute in developing its regulations, where there is ambiguity in the statute, and such ambiguity will have an adverse impact on employees and employers but no benefit to the government (as here), I ask the IRS to execute the statute in a way that carries out the intent of Congress without adding to the burden of employers and employees in trying to manage their own health care costs.

Respectfully,

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