

Notice 2015-52

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From: Culver, Walter H <walter.culver@inl.gov>
Sent: Monday, August 24, 2015 11:21 AM
To: Notice Comments
Subject: Notice 2015-52 -- Excise Tax on High Cost Employer-Sponsored Health Coverage

I would like to draw to your attention to a serious problem with respect to how the excise tax will apply to Department of Energy (DOE) contractors who operate a DOE facility under a "management and operating" (M&O) form of contract. M&O contracts are central to the DOE's business model. In simple terms, DOE pays all expenses incident to operating its facility in accordance with the M&O contract and the Federal Acquisition Regulations (FARs). The FARs provide that some expenses are allowable while other expenses are unallowable. The contractor receives compensation for managing and operating the facility in the form of a negotiated performance-based fee.

FAR 31.205-41 provides that an excise tax is an unallowable expense. This means the contractor has two options: 1) pay the excise tax out of its fee; or, 2) continually reduce the benefits provided under its health plan so as to keep its cost below the excise tax threshold. Neither option is acceptable or sustainable. First, there is no point in contracting under an M&O contract if there is no financial reward for the contractor -- and the excise tax for health care benefits is likely to exceed the contractor's entire fee at some point. This means the DOE will not be able to secure qualified contractors to manage and operate its facilities. Second, if the contractor's health plan benefits are continually reduced, the DOE facility's benefits will become uncompetitive and the facility will be unable to attract and retain qualified employees.

Something needs to change or the DOE will not be able to continue operating its facilities using its traditional M&O form of contract. There may be any number of solutions, but the most simple solution may be to restructure the excess tax approach to focus on the cost being above or below a taxable threshold. Cost below the threshold would continue to be pre-tax (or a deductible business expense) as it is now while cost above the threshold would be after-tax (or a non-deductible business expense). This approach would avoid the "excise tax" characterization. I cannot speak for the DOE; but, this approach may allow the DOE to include cost in excess of the threshold as an allowable expense.

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