

Some Welcome Relief and Clarification on Affordable Care Act for Employers

As the federal agencies continue to issue more guidance on the application of various provisions of the Affordable Care Act (the "ACA") to employer-sponsored health coverage, there are some recent developments that we want to highlight that should be of interest to employers who sponsor group health plans.

Extension of Deadlines for Section 6055 and 6056 Reporting

Through [Notice 2016-4](#), the Internal Revenue Service (the "IRS") extended the deadlines for the 2015 information reporting requirements (for both furnishing to individuals and filing with the IRS) under Sections 6055 and 6056 of the Internal Revenue Code (the "Code").

Section 6055 of the Code requires health insurance carriers, self-insuring employers and other providers of "minimum essential coverage" to file with the IRS, and furnish to covered individuals, annual information returns and statements regarding such coverage. Section 6056 of the Code requires "applicable large employers" (generally those with 50 or more full-time employees, including full-time equivalents, in the previous year) to file with the IRS, and furnish to covered employees, annual information returns and statements relating to health coverage that the employer has offered (or not) to its full-time employees.

The IRS has designated (i) Form 1094-B (*Transmittal of Health Coverage Information Returns*) and Form 1095-B (*Health Coverage*) to meet the reporting requirements under Section 6055 of the Code and (ii) Form 1094-C (*Transmittal of Employer-Provided Health Insurance Offer and Coverage Information Returns*) and Form 1095-C (*Employer-Provided Health Insurance Offer and Coverage*) to meet the reporting requirements under Section 6056 of the Code. The 1094 forms are to be submitted to the IRS; the 1095 forms are to be distributed to employees, where required, with copies also to be provided to the IRS. The new deadlines for furnishing and filing these forms with respect to 2015 coverage and coverage offers are as follows:

- The deadline for furnishing Forms 1095-B and 1095-C to individuals was extended from February 1, 2016 to **March 31, 2016**.
- The deadline for filing Forms 1094-B, 1095-B, 1094-C and 1095-C with the IRS was extended (i) from February 29, 2016 to **May 31, 2016**, if filing by paper, and (ii) from March 31, 2016 to **June 30, 2016**, if filing electronically.

Despite this welcome relief, we still encourage employers to complete these forms as soon as they can, as they are very detailed and can be difficult to complete. The IRS indicated in Notice 2016-4 that, because the new deadlines apply automatically to all filers and are more generous than the extensions requested by some filers, no further extensions will be granted. Employers who fail to furnish or file the forms by the new deadlines may be subject to penalties under Sections 6721 and/or 6722 of the Code for failure to timely furnish and file. While the IRS has previously stated that "good faith" compliance with the information reporting requirements regarding 2015 coverage and coverage offers will limit the imposition of penalties, it indicated that such penalty relief only applies to furnishing and filing incorrect or incomplete information and **not** to a failure to timely furnish or file.

Treatment of Opt-Out Payments for Purposes of Determining ACA Affordability

Under ACA's employer mandate, applicable large employers who do not provide minimum essential coverage to their full-time employees and dependents, or coverage that is affordable and provides minimum value, may be subject to penalties. The "affordability" of coverage depends, in part, on the premium charged for individual coverage.

Through [Notice 2015-87](#), the IRS indicated that, if an employer offers an employee a payment that is conditioned solely on the employee declining coverage under the employer's health plan and not on the employee satisfying any other meaningful requirements (such as a requirement to provide proof of coverage provided by a spouse's employer), such an "unconditional" opt-out payment should be treated as part of the additional pre-tax premium amount for purposes of determining ACA affordability. The IRS is of the view that such opt-out payment may have the effect of increasing an employee's cost for health coverage beyond the amount of any salary reduction contribution, and it gave the following example in Notice 2015-87:

If an employer offers employees group health coverage through a Section 125 cafeteria plan, requiring employees who elect self-only coverage to contribute \$200 per month toward the cost of that coverage, and offers an additional \$100 per month in taxable wages to each employee who declines the coverage, the offer of \$100 in additional compensation has the economic effect of increasing the employee's contribution for the coverage. In this case, the employee contribution for the group health plan effectively would be \$300 (\$200 + \$100) per month, because an employee electing coverage under the health plan must forgo \$100 per month in compensation in addition to the \$200 per month in salary reduction.

The IRS stated that it intends to propose regulations reflecting this position on opt-out payments and hinted that the proposed regulations may treat opt-out payments differently if they are conditioned not only on the employee declining employer-sponsored coverage but also on satisfaction of additional conditions, such as the employee providing proof of having coverage provided by a spouse's employer or other coverage.

The Treasury Department and the IRS anticipate that the regulations generally will apply only for periods after the issuance of final regulations. However, they also anticipate that mandatory inclusion in the employees' required contribution (for purposes of determining ACA affordability) of amounts offered or provided under an "unconditional" opt-out arrangement that is adopted **after** December 16, 2015 (the date of publication of Notice 2015-87) will apply for periods after December 16, 2015. The IRS will treat an opt-out arrangement as adopted after December 16, 2015, **unless:**

- The employer offered the opt-out arrangement (or a substantially similar opt-out arrangement) with respect to health coverage provided for a plan year including December 16, 2015;
- A board, committee, or similar body or an authorized officer of the employer specifically adopted the opt-out arrangement before December 16, 2015; or
- The employer had provided written communications to employees on or before December 16, 2015 indicating that the opt-out arrangement would be offered to employees at some time in the future.

In light of this guidance, employers who do not currently have, but are thinking about offering, an "unconditional" opt-out arrangement should carefully consider the consequences such arrangement would have on the "affordability" of the employer-sponsored health coverage before adopting such arrangement. Employers who already have an opt-out arrangement (whether it is "unconditional" or not) may want to keep the arrangement as is, but should carefully monitor developments and further IRS guidance on this issue.

Treatment of Flex Credits for Purposes of Determining ACA Affordability and Section 6056 Reporting

The IRS also indicated through Notice 2015-87 that, for purposes of determining ACA affordability, an employer's flex contribution to a cafeteria plan can reduce the amount of the employee portion of the premium so long as (i) the employee may not opt to receive the amount as a taxable benefit, (ii) the amount may be used to pay for minimum essential coverage and (iii) the employee may use the amount exclusively to pay for medical care.

Notice 2015-87 also clarified that, if the employer's flex contribution that may be used to pay health expenses may also be used for non-health benefits (such as dependent care or group term life insurance), the flex contribution would be considered a "non-health flex contribution" and may not be used to reduce the amount of the employee premium for purposes of determining ACA affordability. However, some transition relief was provided. Under Notice 2015-87, for plan years beginning **before** January 1, 2017, an employer's flex contribution that is not a health flex contribution because it may be used for non-health benefits (including non-taxable benefits and/or cash or another taxable benefit), but may be used by the employee toward the amount the employee is otherwise required to pay for the health coverage, can nonetheless be treated as reducing the amount of the employee's required contribution for health coverage, but further noted that this relief is **not** available with respect to a flex contribution arrangement offering non-health benefits that is adopted **after** December 16, 2015 or substantially increases the amount of the flex contribution **after** December 16, 2015 (a "non-relief-eligible flex contribution arrangement")¹.

In addition, solely for coverage for plan years beginning **before** January 1, 2017, the IRS stated that an employer may reduce the amount of the employee's required contribution by the amount of a non-health flex contribution (other than a flex contribution made under a non-relief-eligible flex contribution arrangement) for purposes of information reporting under Section 6056 of the Code (line 15 of Form 1095-C). However, because treating a non-health flex contribution as reducing an employee's required contribution may affect the employee's eligibility for premium tax credit, the IRS encouraged employers in Notice 2015-87 not to reduce the amount of the employee's required contribution by the amount of a non-health flex contribution for purposes of information reporting under Section 6056 of the Code. But, where, in light of that suggestion, the employer does not reduce the amount of the employee's required contribution by the amount of a non-health flex contribution in its information reporting, the IRS indicated that if the employer is contacted by the IRS about a potential penalty assessment that would not have applied had "affordability" of employer-provided coverage been achieved by applying the non-health flex contribution to reduce the amount of the employee's required contribution for health coverage, the employer should be able to respond (and presumably avoid a penalty assessment) by showing that the penalty should not apply in light of the transition relief that would have permitted different reporting.

Please note that Notice 2015-87 also addressed a number of the other topics that are not discussed in this Alert, such as guidance on health reimbursement account (HRA) arrangements and fringe benefit payments under the McNamara-O'Hara Service Contract Act or other similar laws. If you have any questions regarding any of the other topics addressed in Notice 2015-87, please contact one of the attorneys listed below.

Cadillac Tax Delayed Until 2020

On December 18, 2015, President Obama signed the Consolidated Appropriations Act, 2016, which, among other things, delayed the effective date of the "Cadillac Tax" until **January 1, 2020** and made the tax deductible. As originally enacted, the tax would have taken effect on January 1, 2018 and would have been nondeductible.

The "Cadillac Tax" was added to the Code by the ACA and imposes a 40% excise tax on high-cost employer-sponsored

¹ Whether a flex contribution arrangement is adopted after December 16, 2015 will be determined using the same standard described above for determining whether an opt-out arrangement is adopted after December 16, 2015.

health coverage that exceeds certain dollar thresholds (\$10,200 per year for self-only coverage and \$27,500 per year for all coverage other than self-only coverage, subject to annual indexation). It applies to both insured and self-insured health plans, regardless of whether the coverage is paid for by the employer, the employee or a combination of both.

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<u>David M. Glaser</u>	212-336-2624	<u>dmglasser@pbwt.com</u>
<u>Bernard F. O'Hare</u>	212-336-2613	<u>bfohare@pbwt.com</u>
<u>Jessica S. Carter</u>	212-336-2885	<u>jcarter@pbwt.com</u>
<u>Charles Shi</u>	212-336-2264	<u>cshi@pbwt.com</u>

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