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IRS Defers Application of Nondiscrimination Rules for Insured Group Health Plans

December 23, 2010

On December 22, 2010, the Internal Revenue Service ("IRS") released Notice 2011-1, which defers application of certain nondiscrimination requirements applicable to insured group health plans under the Affordable Care Act (the "Act"). Notice 2011-1 provides that compliance with the Act's nondiscrimination requirements is not required (and thus any sanctions for failure to comply do not apply) until future guidance is issued. This means that plan sponsors will not be required to file IRS Form 8928 (requiring employers to self-report any failure to meet certain group health plan requirements) or to pay any excise tax associated with failure to comply with the Act's nondiscrimination requirements until future guidance is issued.

Reason for the Delay

The Act prohibits insured group health plans from discriminating in favor of "highly compensated individuals" with respect to either eligibility to participate in the plan or benefits available under the plan. Specifically, the Act provides that rules "similar" to those found at Section 105(h) of the Internal Revenue Code apply to non-grandfathered insured group health plans, effective with the first plan year beginning on or after September 23, 2010. The use of the word "similar" in this context implies that regulatory guidance is necessary in order to adequately inform plan sponsors of their obligations under the Act. It is for this reason that the IRS has delayed compliance with the Act's nondiscrimination requirements until such time that implementing regulations (or other guidance) are released.

Additional Comment Period

Earlier in the year in Notice 2010-63, the IRS requested comments on issues that should be addressed in future guidance, and on the suggested resolution of those issues. As a more specific follow-up to the comments received earlier in the year, Notice 2011-1 provides an additional comment period, ending March 11, 2011, during which the IRS requests comments on topics including the following:

1. What constitutes nondiscriminatory benefits, and what is included in the term "benefits" (e.g., employer contributions, waiting periods, etc.).
2. The suggestion that an alternative method of compliance be available that would involve only an availability of coverage test.
3. The application of the requirements to insured group health plans beginning in 2014 when the health insurance exchanges become operational and the employer mandate, individual mandate, premium tax credit and related Act provisions are effective.
4. The suggestion that the nondiscriminatory classification test could apply an alternate definition of highly compensated employee.
5. The suggestion that the nondiscrimination standards should be applied separately to employers sponsoring insured group health plans in distinct geographic locations and on whether application of the standards on a geographic basis should be permissive or mandatory.
6. The suggestion that the guidance should provide a "safe harbor."
7. Whether employers should be permitted to aggregate different, but substantially similar, coverage options for nondiscrimination testing purposes and, if so, the basis upon which a "substantially similar" determination could be made.
8. The application of the nondiscrimination rules to "expatriate" coverage.
9. The application of the nondiscrimination rules to multiple employer plans.
10. The suggestion that coverage provided on an after-tax basis should be disregarded in applying the nondiscrimination rules.
11. The treatment of employees who voluntarily waive employer coverage in favor of other coverage.
12. Potential transition rules following a merger, acquisition, or other corporate transaction.
13. The application of sanctions for noncompliance.

The IRS is encouraging employers and other interested parties to file comments on these important issues. If you would like our assistance in preparing a comment on this guidance or you have any other questions, please feel free to contact your Proskauer lawyer or any member of our Health Care Reform Task Force.