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Health Reform Update: Recent Changes and Challenges to the Affordable Care Act

May 9, 2011

On April 14, 2011, the President signed the Comprehensive 1099 Taxpayer Protection Act, followed by the Continuing Appropriations Act, which was signed into law the next day. These Acts repealed two key provisions of the Affordable Care Act of note to employers and other sponsors of group health plans, one of which would have affected employers as early as January 1, 2012—the expanded Form 1099 reporting requirement and the free choice voucher program.

REPEAL OF EXPANDED FORM 1099 REPORTING REQUIREMENT

The expanded Form 1099 reporting requirement was seemingly unrelated to health reform; however, it was included as part of the Affordable Care Act to raise approximately $20 billion in tax revenue to offset part of the cost of health reform.

Prior to its repeal, the provision would have been effective January 1, 2012, and required employers to issue a Form 1099 to any vendor from whom the employer purchased $600 or more of goods or services in a calendar year. A similar rule already applies to employers who make payments in excess of $600 to any individual in a calendar year (i.e., an independent contractor), which remains unchanged. Small employers in particular had voiced concern that the expanded Form 1099 requirement, if not repealed, would have added significantly to the cost of tax reporting.

The Comprehensive 1099 Taxpayer Protection Act includes a provision to offset the loss of tax revenue due to the repeal of the Form 1099 requirement. Individuals who receive a federal premium subsidy (generally those whose household income is less than 400% of the federal poverty level) will be required to return part of the subsidy if their income exceeds certain levels. Repayments are based on a sliding scale, with those earning in excess of 400% required to repay the entire subsidy amount. These changes are a considerable increase from those initially established under the Affordable Care Act.

Repeal of The Free Choice Voucher

Prior to its repeal, the free choice voucher provision would have been effective January 1, 2014, and required employers to offer certain employees a free choice voucher to opt out of the employer's health plan and enroll in coverage through an exchange. To be eligible for a voucher, an employee's premium contributions had to be between 8 percent and 9.8 percent[1] of household income, which could not exceed 400% of the federal poverty level. The voucher would have equaled the employer's contribution to the plan for which the employer pays the largest portion of the cost of the plan. Employees eligible for vouchers would have been able to use the voucher to obtain health coverage through an exchange and keep any remaining voucher amount as taxable income.

Employers expressed concern that younger, healthier employees who fit within the voucher's parameters would be willing to purchase bronze-level coverage in an exchange in order to keep the remainder of the voucher. This would not only be an additional cost to the employer, but could increase adverse selection in the employer's group health plan.

Although repeal of the free choice voucher may seem like a victory for employers, it removes an employer's ability to avoid a nondeductible penalty under the Affordable Care Act (for failure to offer affordable coverage) by providing a free choice voucher, which would have been deductible by the employer. This is a good example of the interrelation between various provisions of the Affordable Care Act.

Other Challenges To Health Reform

On April 13, 2011, the House of Representatives passed HR 1217, which would repeal the Prevention and Public Health Fund established by PPACA. The Prevention and Public Health Fund contains almost $18 billion in mandatory spending, including $200 million for small business wellness plan grants, and is a major component of health reform.

However, this bill may have significant difficulty passing the Senate. Even if it were to obtain Senate approval, the White House released a Statement of Administration Policy on HR 1217 indicating that any attempts to eliminate funding or repeal the Prevention and Public Health Fund will be met with a veto.

Reminder: Section 125 Plans May Need To Be Amended By July 1

As discussed more fully in our September 28, 2010 client alert (Changes on Over-the-Counter Drug Coverage Required Under Health Care Reform in 2011), IRS Notice 2010-59 provides that over-the-counter medicines or drugs purchased without a prescription on or after January 1, 2011 (other than insulin) may no longer be paid for or reimbursed under account-based plans, such as health FSAs, HRAs, and HSAs.

The rules governing cafeteria plans generally require plan amendments to take effect on a prospective basis. However, Notice 2010-59 provides that notwithstanding the general rule against retroactive cafeteria plan amendments, an amendment to conform a cafeteria plan to the requirements of Notice 2010-59 that is adopted no later than June 30, 2011 may be made effective retroactively for expenses incurred after December 31, 2010 (or after January 15, 2011, as may be permitted for health FSA and HRA debit card purchases).

Please contact your Proskauer attorney or any member of our Health Care Reform Task Force should you have questions regarding any aspect of health care reform.

[1] This likely should have been 9.5 percent, which is the level at which an individual generally becomes eligible for federal premium assistance instead of a free choice voucher.