PPACA, HIPAA and Federal Health Benefit Mandates: Practical Q&A

IRS Notice 2015-87 Provides Much Needed Guidance for Account-Based Plans and ACA Employer Shared Responsibility Requirement (IRC 4980H)[1]

In IRS Notice 2015-87, the agencies provided further clarification on the impact of the Affordable Care Act (ACA) group health plan market reform provisions on account-based plans and much needed guidance on the Section 4980H employer shared responsibility requirements. In many cases, common benefit design practices for employer credits and opt-outs must be revisited prior to the next annual enrollment.

In this two part article we cover this important IRS guidance. Part I will cover the impact of Notice 2915-87 on HRAs, FSAs and HSAs. Part II will cover guidance related to the IRC 4980H excise tax and FSA carryover provisions.

Health Reimbursement Arrangements (HRAs) and ACA Market Reform Provisions

Q1 Retiree-only HRAs; Exempt Retiree-only HRAs

In prior guidance, the agencies made it clear that HRAs subject to the group market reform rules cannot use the HRA to purchase individual market medical coverage. The IRS reiterates that an HRA that covers less than two current employees, such as a retiree-only HRA, is not subject to the ACA's group market reforms. The ACA's group market requirements that require plans to provide no-cost preventive care and prohibit annual or lifetime dollar limits (the "market reforms") on essential health benefits do not apply.

The IRS concluded that a retiree-only HRA can base balances in whole or in part on amounts credited to the HRA as an active employee covered by an HRA integrated with major medical coverage. That said, the IRS cautions that former employees are not eligible for premium tax credits in the Marketplace for any month HRA funds are available to them.

Q2 HRAs Cannot be Used to Purchase Individual Market Coverage for Current Employees...They Really Mean It!

Once again, the IRS makes it clear that an HRA cannot be used by current employees to purchase individual market major medical coverage. An HRA that can be used to purchase individual market major medical coverage will not be considered integrated with ACA compliant group health coverage. As a result, the HRA would violate the ACA's group market reforms.

Building on that premise, the IRS adds that an integrated HRA cannot be used to purchase individual market major medical coverage even if integrated with ACA compliant group health coverage.

Practice Pointer: *Notice 2015-87 closes the door on HRAs that reimburse individual market major medical coverage.*

Q3 Transition Relief for Spend-down HRAs for Some Amounts Credited Before 2014

In 2013 FAQ guidance, the agencies provided transition relief for certain pre-existing HRAs. Notice 2015-87 clarifies that after December 31, 2013, HRAs can reimburse medical expenses without violating the ACA's market reforms if:

1. The amounts were credited before January 1, 2013; or
2. The amounts were credited during 2013 under the terms of an HRA in effect on January 1, 2013.

However, if the HRA in effect on January 1, 2013, did not set the amounts to be credited during 2013 or the timing of the credits, the amounts credited during 2013 cannot exceed the amounts credited during 2012 and be credited on an earlier schedule or at a faster rate than the 2012 crediting schedule or rate.

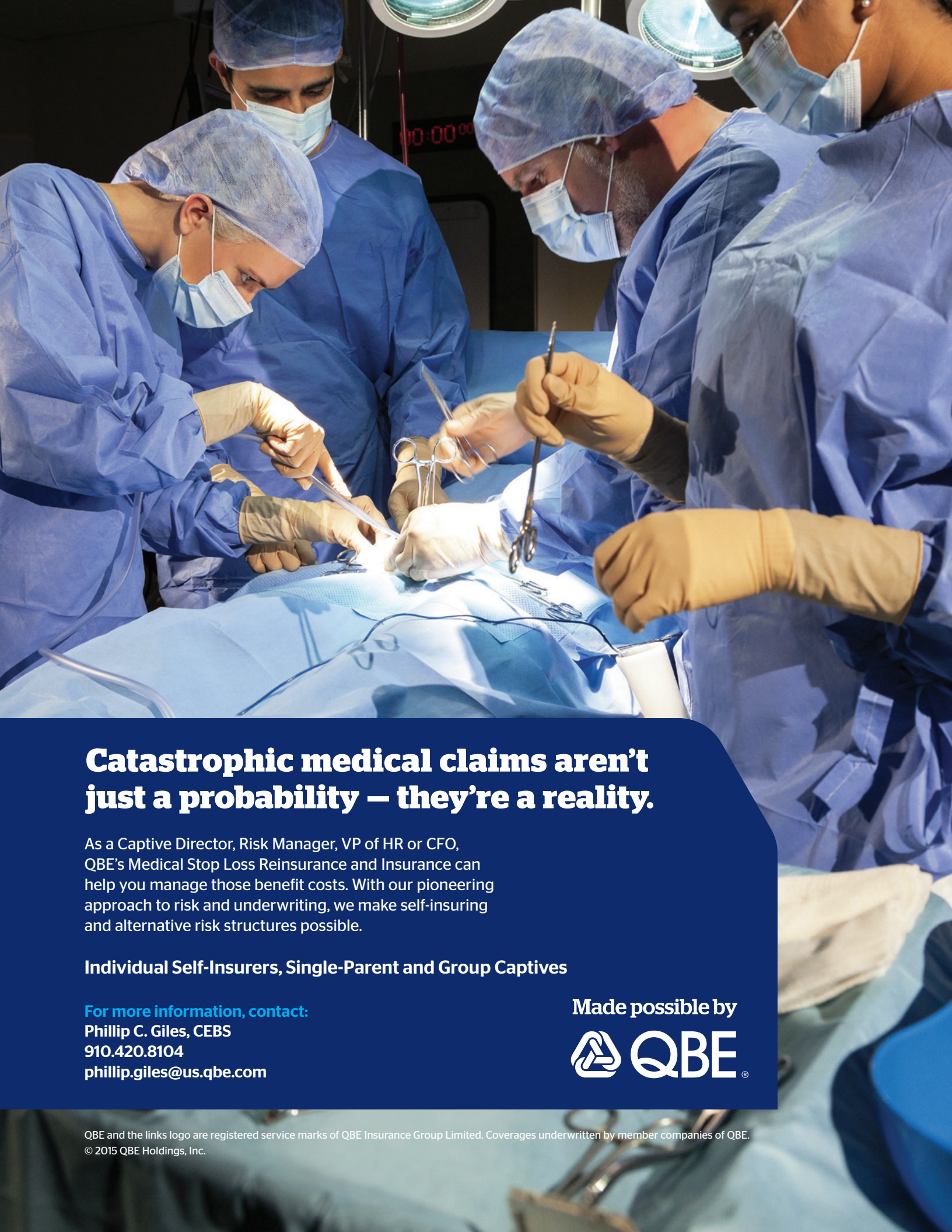
Q4 HRAs Integrated with Employee-only Coverage Cannot Reimburse Expenses of Spouse or Dependents

In a significant clarification, the IRS concluded that an HRA that is integrated with employee-only

coverage cannot be used to reimburse expenses of an employee's spouse and/or dependents. The HRA only satisfies the ACA's group market reforms if it is limited to individuals who are enrolled in both the HRA and the employer's ACA compliant group health plan.

However, the IRS recognized that many HRAs do not currently restrict HRA reimbursements to those covered by the employer's ACA compliant group health plan. An HRA will not fail to be treated as integrated with an employer's ACA compliant group health plan for plan years beginning before January 1, 2016, solely because there is not an overlap in coverage category. In addition, an HRA and group health plan that otherwise would be integrated based on the plan's terms on December 16, 2015, will be treated as integrated for plan years beginning before January 1, 2017, even if it reimburses expenses of family members not enrolled in the employer's other group health plan.

Practice Pointer: *Notice 2015-87 is not clear whether the family members must be enrolled in an ACA compliant plan of the same employer or whether enrollment in an ACA compliant plan of another employer would suffice. The Notice seems to say that coverage in the ACA compliant plan must be provided by the same employer; however, the final regulations issued prior to the Notice indicate that an HRA can be integrated with another employer's group health plan.*



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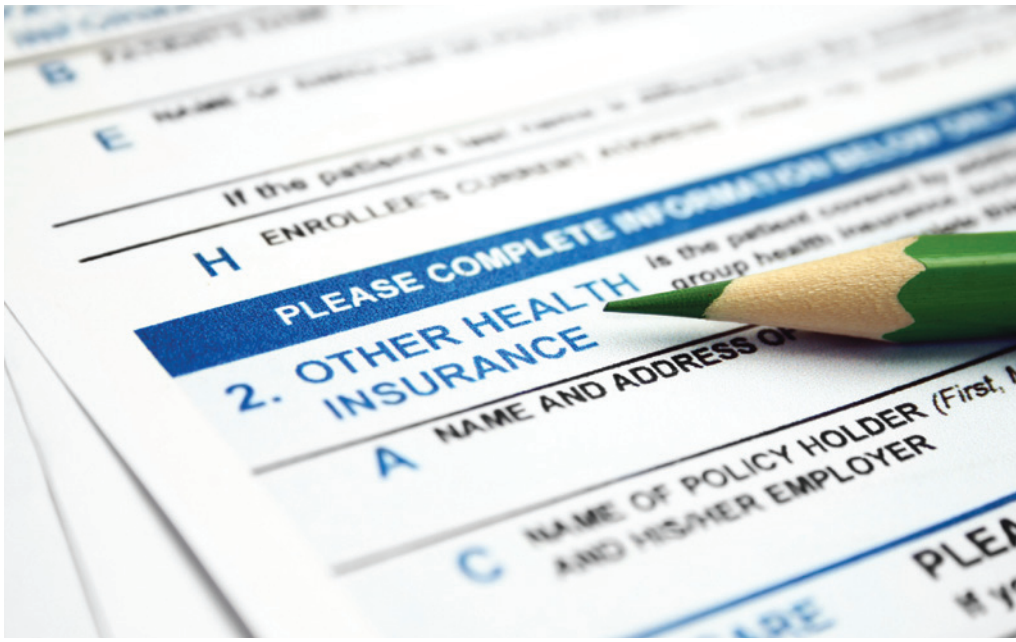
Practice Pointer:

The IRS says that the employer must report each individual whose medical expenses are reimbursable as having received minimum essential coverage under Section 6055 (i.e., for 1095 reporting). In some cases, an employer might not know whose expenses are reimbursable under the HRA if the employee has never received group health plan coverage through the employer and/or the employee never filed a claim for that dependent's expenses. Further guidance would be welcome.

Q5 HRA or Employer Payment Plan Can Reimburse Individual Market Coverage for Excepted Benefits Like Dental and Vision

The IRS clarified that an HRA or employer payment plan can reimburse individual coverage that is restricted to excepted benefits only. Typically, such excepted benefits include standalone dental and vision coverage. When funded through an HRA (as opposed to salary reduction through a cafeteria plan), such coverage should not include specified disease or other fixed indemnity coverage.



Practice Pointer: *The IRS examples indicate that HRAs that reimburse individual market coverage must have terms limiting reimbursement to coverage for excepted benefits. If the terms of the HRA do not limit reimbursement of individual market coverage to excepted benefits, then the HRA violates the ACA's market reforms. Plan sponsors should review their HRA plan documents and amend them if needed.*

Q6 An Employer Payment Plan Offered Under a Cafeteria Plan Cannot be Used to Purchase Individual Market Major Medical Coverage... Again, They Really Mean It!

The IRS confirms that a cafeteria plan that allows employees to purchase individual market major medical coverage with pre-tax dollars would also be considered an employer payment plan and thus would be prohibited from funding individual market major medical coverage.

How HRAs, Flex Credits, Opt-outs and Service Contract Act/Davis-Bacon Act Fringe Benefits Affect Affordability

The IRS also provided guidance on how HRA contributions, flex credits and opt-outs affect the affordability and minimum value calculations for employers subject to the ACA's employer mandate.

Q7 Certain HRA Contributions Reduce Employees' Required Contribution for Affordability Purposes

Based on the premium tax credit and affordability regulations, amounts made available under an integrated HRA that employees can use to pay premiums for the employer's plan in the current plan year reduce the employee's required contribution for affordability purposes, even if the employee can also use those amounts to pay cost sharing or other benefits. However, HRA contributions only reduce the employee's required contribution for affordability purposes to the extent the HRA's terms require the employer's contribution or the amount is determinable within a reasonable time before the employee must decide whether to enroll in the employer's group health plan.

For purposes of excise taxes for unaffordable coverage under Section 4980H(b) (the "tackhammer" penalty), as well as Section 6056 reporting (IRS Form 1095-C), the employer contribution is treated as made ratably for each month of the period it relates to.

Q8 Certain "Health Flex Contributions" Reduce an Employee's Required Contribution for Affordability Purposes. Cashable Credits and Unrestricted Credits will Not Reduce Required Contributions.

Certain flex credits reduce the employee's required contribution for affordability purposes when they are "health flex contributions." Health flex contributions are employer contributions that the employee:

1. Cannot opt to receive as a taxable benefit;
2. May use to pay for minimum essential coverage; and
3. May use exclusively for Section 213 medical care.

For purposes of excise taxes for unaffordable coverage under Section 4980H(b)(the tackhammer penalty), as well as Section 6056 reporting (IRS Form 1095-C), a health flex contribution is treated as made ratably for each month of the period it relates to.

Flex contributions that are not health flex contributions do not reduce the employee's required contribution for affordability purposes. Thus, if an employee *can* use a flex credit to pay for non-health care benefits (for example, dependent care or life insurance), then the flex credit will not reduce the amount the employee pays toward the employer's group health plan for affordability purposes even if the employee ultimately uses the credit for health coverage.

The IRS based the distinction between health flex contributions and non-health flex contributions on the final Section 5000A regulations. Those regulations state that the employee's required contribution is the amount of compensation that the employee could use for something other than health-related expenses that the employee must forgo to obtain the employer's health plan coverage.

EXAMPLE An employee who elects self-only health plan coverage must pay $200 per month toward the cost of coverage. The employer offers flex contributions of $600 per year that can only be applied toward the employee share of health plan coverage or contributed to a health FSA. In this case, the flex contribution is a health flex contribution regardless of whether the employee applies it to the employee share of health plan coverage or contributes it to the health FSA. For Section 4980H(b) and its reporting under Section 6056, the employee's monthly required contribution for group health coverage is $150 ($200 – $50).

– *Note that the amounts above are based on the example in Notice 2015-87. However, if more than $500 of the health flex credit can be contributed to a health FSA, then the health FSA would not be an excepted benefit, which means that the health FSA would be subject to the ACA's market reforms. Plan sponsors should use caution when applying this example.*

EXAMPLE An employee who elects self-only heath plan coverage must pay $200 per month toward the cost of coverage. The employer offers flex contributions of $600 for the plan year that can be used for any cafeteria plan benefit, including non-health benefits like dependent care. The flex credit is not available as cash. In this case, the flex contribution is not a health flex contribution and does not reduce the employee's required contribution because it can be used for purposes other than medical care.

– *Again, note that a flex credit of more than $500 that cannot be cashed out would prevent a health FSA from being considered an excepted benefit, which would violate the ACA's market reforms.*

EXAMPLE An employee who elects self-only heath plan coverage must pay $200 per month toward the cost of coverage. The employer offers flex contributions of $600 for the plan year that can be used for any cafeteria plan benefit, including non-health benefits like dependent care and is available as taxable cash. In this case, the flex contribution is not a health flex contribution and does not reduce the employee's required contribution because it can be used for purposes other than medical care or taken as cash.

– *Note, however, that the flex credit is payable as taxable cash, so the health FSA could still be considered an excepted benefit.*

Solely for purposes of the Section 4980H(b) tackhammer penalty and for plan years beginning *before* January 1, 2017, employer flex contributions that are not health flex contributions, but that can be applied toward health coverage, will be treated as reducing the employee's required contribution for health plan coverage. However, these flex contributions must be made under an arrangement adopted before December 17, 2015. Flex contribution arrangements adopted after December 16, 2015, or arrangements that substantially increase the flex contribution after that date, are not eligible for this relief. A flex contribution arrangement is treated as adopted before December 17, 2015, if:

1. The employer offered the flex contribution arrangement (or a substantially similar flex contribution arrangement) for a plan year that included December 16, 2015;
2. A board, committee or similar body or an authorized officer of the employer specifically adopted the flex contribution arrangement *before* December 16, 2015; or
3. The employer had provided written communications to employees *on or before* December 16, 2015, indicating that the flex contribution arrangement would be offered to employees at some time in the future.

Additionally, for plan years beginning *before* January 1, 2017 (i.e., 2015 and 2016), an employer may reduce the amount of the employee's required contribution by the amount of a non-health flex contribution on line 15 of Form 1095-C even if the flex credit qualifies for the above relief. However, the IRS encourages employers not to reduce the amount of the employee's required contribution by the amount of non-health flex contributions on Form 1095-C because the reduction might affect the employee's eligibility for premium tax credits. As a result,

if the employer does not reduce the employee's required contribution on line 15 and is contacted by the IRS regarding excise taxes under Section 4980H(b), the employer can respond to the IRS by showing that:

1. The *employee* would not have been entitled to the premium tax credit if it had reduced line 15 by the non-health flex contribution amount; or
2. The *employer* would have qualified for an affordability safe harbor if the employee contribution had been reduced.

In this situation, both the employer and the employee win, as the employer will be relieved from the 4980H(b) penalty, but the non-health flex contribution will not reduce the employee's required contribution when determining eligibility for the premium tax credit.

Practice Pointer: *Notice 2015-87 reminds employers that flex credits an employee can elect to receive as cash or a taxable benefit are counted toward the limit on salary reduction contributions to health FSAs under Section 125(i).*

Q9 Availability of Unconditional "Opt-out" Arrangements Increase the Employee's Required Contribution for Affordability Determinations

Many employers provide "opt-out credits" for employees who decline health coverage. The IRS clarified its position regarding unconditional opt-out payments, which are payments when an employer offers an amount that cannot be used for coverage under its health plan and is only available if the employee declines or waives coverage. An opt-out payment is "unconditional" if it is conditioned solely on the employee declining coverage and not on the employee satisfying other meaningful requirements, such as providing proof of coverage through a spouse's employer.

The IRS stated that the choice between cash and coverage for an unconditional opt-out payment is the same as the cash or coverage choice employees make with salary reductions. In both cases, the employee can purchase health coverage only by giving up a specified amount of cash that he or she would otherwise receive (in other words, salary for salary reductions, or other compensation for the opt-out payment). For example, an employee who must reduce his or her compensation by $1,000 to pay for employer-provided health coverage is making a choice similar to the employee who is not required to pay anything for coverage, but who receives an additional $1,000 in compensation for declining coverage. In both cases, the employee must give up $1,000 in compensation that otherwise would be available.

EXAMPLE An employer requires employees who elect self-only coverage to contribute $200 per month through its cafeteria plan. However, the employer offers an additional $100 per month in taxable wages if the employee declines coverage. The offer of $100 in additional compensation has the effect of increasing the employee's contribution to $300 per month because he or she must forgo $100 per month in compensation in addition to the $200 per month salary reduction for coverage.

The IRS intends to issue proposed regulations regarding this rule. However, the IRS anticipates amounts offered or provided under an unconditional opt-out arrangement that is adopted after December 16, 2015, will increase the employee's contribution for affordability purposes. An opt-out arrangement is treated as adopted after December 16, 2015, if:

1. The employer offered the opt-out arrangement (or a substantially similar flex contribution arrangement) for a plan year including December 16, 2015;
2. A board, committee or similar body or an authorized officer of the employer specifically adopted the opt-out arrangement *before December 16, 2015*; or
3. 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.

Before the applicability date of regulations, employers are not required to increase the amount of an employee's required contribution for Section 6056 (Form 1095-C) reporting purposes if the opt-out is eligible for this relief. In addition, an opt-out payment that is eligible for relief will not increase an employee's required contribution for purposes of determining the tackhammer excise tax under Section 4980H(b).

Again, both the employer and the employee win under this guidance because until the applicability date of any further guidance and at least for plan years that

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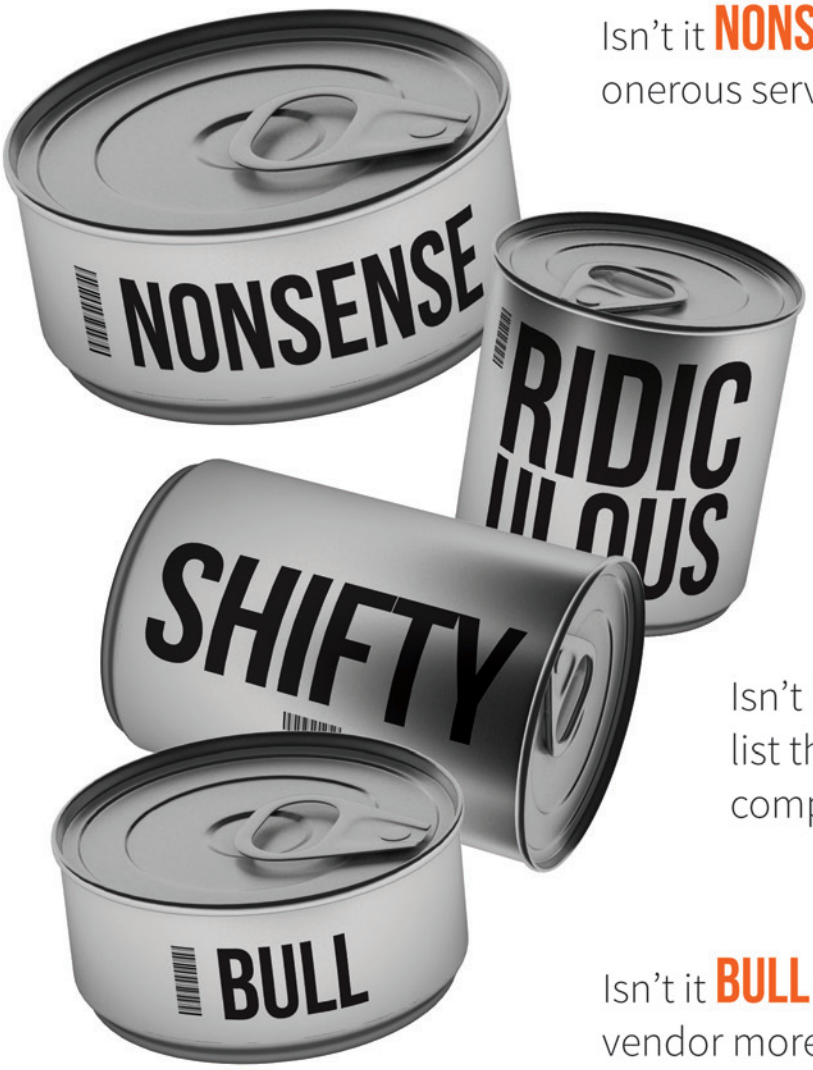

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begin before January 1, 2017, individuals can treat unconditional opt-out payments as increasing their required contribution for purposes of determining premium tax credits. Also, an individual who can demonstrate that he or she meets a condition that must be satisfied to receive an opt-out payment (e.g., coverage under a spouse's plan) in addition to declining an employer's health coverage may treat the opt-out as increasing his or her required contribution for premium tax credit purposes.

Deadline Delayed for 2015 Forms 1094-C and 1095-C

Finally, the IRS noted that it provided delayed deadlines to submit Forms 1094-C and 1095-C. Employers now have until March 31, 2016, to provide employees with the 1095-C (it was due February 1, 2016). It also extends the due date for electronic filing of the 2015 Forms 1094-C and 1095-C with the IRS from March 31, 2016, to June 30, 2016 (paper submissions by employers filing less than 250 Forms 1095-C are now due May 31, 2016).

The good news for employees is that they can file their income tax return before they receive their 1095-C and *will not* need to amend their returns if they rely on coverage information they received from their employer previously.

The IRS will not allow additional extensions. Employers must show a good-faith effort to comply, as well as file and furnish the statements by applicable deadlines, to qualify for relief from accuracy penalties. Otherwise, the employer must satisfy the IRS's standards for reasonable cause to receive relief. The IRS provided more information on this relief in Notice 2016-4. ■

The Affordable Care Act (ACA), the Health Insurance Portability and Accountability Act of 1996 (HIPAA) and other federal health benefit mandates (e.g., the Mental Health Parity Act, the Newborns and Mothers Health Protection Act and the Women's Health and Cancer Rights Act) dramatically impact the administration of self-insured health plans. This monthly column provides practical answers to administration questions and current guidance on ACA, HIPAA and other federal benefit mandates.

Attorneys John R. Hickman, Ashley Gillihan, Carolyn Smith and Dan Taylor provide the answers in this column. Mr. Hickman is partner in charge of the Health Benefits Practice with Alston & Bird, LLP, an Atlanta, New York, Los Angeles, Charlotte and Washington, D.C. law firm. Ashley Gillihan, Carolyn Smith and Dan Taylor are members of the Health Benefits Practice. Answers are provided as general guidance on the subjects covered in the question and are not provided as legal advice to the questioner's situation. Any legal issues should be reviewed by your legal counsel to apply the law to the particular facts of your situation. Readers are encouraged to send questions by email to Mr. Hickman at john.hickman@alston.com.

[1] Steven Mindy, Esq. a senior associate in the Washington, DC office of Alston & Bird, LLP assisted with this article.