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- Financial Consulting

Our News Briefs are going electronic!

To receive future editions electronically, please email jcremerius@swcllp.com.

Can we incentivize employees with high claims costs to opt out?

Question: Our company offers coverage under a self-insured major medical plan to full-time employees. Can we offer cash incentives to those with a history of high claims costs to opt out of our plan and buy individual policies instead?

Answer: In a word, no. This idea was addressed in guidance jointly issued just last year by the IRS, the Department of Labor and the Department of Health and Human Services. The agencies stated that offering a choice between cash and enrollment in an employer's standard group health plan constitutes prohibited health status discrimination under the Affordable Care Act (ACA) and the Health Insurance Portability and Accountability Act (HIPAA)—if the offer is made to only employees with high claims risk.

It may seem like you're treating high-claims employees more favorably by giving them a choice between cash and coverage—especially now that the ACA guarantees availability of individual coverage without pre-existing condition exclusions. But the agencies don't view this choice as permitted discrimination in favor of individuals who have adverse health conditions.

In fact, according to the agencies, these employees have a greater effective cost of coverage because their cost is deemed to include the cash they'll forgo if they elect to enroll in your plan. In addition, the cash-or-coverage offer is considered to be an eligibility rule that discourages plan participation based on a health factor.

Additional Points of Concern

The agencies view these arrangements as discriminatory, regardless of whether:

- The cash payment is pretax or after-tax to the employee,
- The employer is involved in the selection or purchase of individual insurance policies, or
- The employee obtains any individual coverage

And because choosing between cash and tax-favored health coverage requires a cafeteria plan election, the agencies assert that imposing an additional cost to elect health coverage could result in prohibited discrimination under Section 125 of the Internal Revenue Code.

Note also that you couldn't condition availability of any financial incentive (whether or not based on health or claims history) on the employee's actual purchase of an individual insurance policy.

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Sidebar: Final IRS rules on premium tax credits

The IRS released final regulations addressing individuals' eligibility for the ACA's premium tax credit. The regulations cover a number of important points of which employers should be aware. Areas covered include:

Wellness program incentives. Incentives under a nondiscriminatory wellness program that reduce either cost-sharing or premiums generally aren't considered amounts paid by the plan for purposes of determining the plan's minimum value or affordability, unless the program is designed to prevent or reduce tobacco use. Wellness incentives are taken into account for affordability and minimum value only if they relate to tobacco use, in which case it's assumed that the employee qualifies for the incentive.

Employer contributions to HRAs. HRA contributions are taken into account only if the HRA and the primary employer-sponsored coverage are offered by the same employer. Employer contributions to an HRA reduce an employee's required contribution (or count toward providing minimum value) only to the extent the amount of the contribution is required under the terms of the plan or is determinable within a reasonable time before the employee must decide whether to enroll.

Employer contributions to cafeteria plans. For purposes of affordability, the final regulations adopt the rule that an employee's required contribution is reduced by employer contributions under a cafeteria plan that: 1) may not be taken as a taxable benefit; 2) may be used to pay for minimum essential coverage; and 3) may be used only to pay for medical care within the meaning of Internal Revenue Code Section 213.

Postemployment coverage. The regulations provide that an individual who may enroll in COBRA or similar state continuation coverage is considered eligible for minimum essential coverage only for months that the individual is enrolled in the coverage. They further clarify that this rule applies only to former employees (not to current employees with reduced hours) and extend the rule to retiree coverage.

Do our contributions count toward the health FSA limit?

Question: Our company's cafeteria plan includes a health Flexible Spending Account (FSA) that has always been funded solely by employee salary reductions. For next year, however, we're thinking about adding an employer contribution feature—such as a matching or seed contribution. Would these employer contributions count toward the limit that applies to health FSAs?

Answer: **T**he statutory limit ($2,550 for plan years beginning in 2015 or 2016) applies only to health FSA salary reduction contributions. Nonelective employer contributions, such as the matching or seed contributions you mention, generally don't count toward the limit. But if employees may elect to receive the employer contributions in cash or as a taxable benefit, the contributions will be treated as salary reductions and will count toward the limit if contributed to the health FSA.

Employer contributions may also raise other compliance issues. For example, if the employer contribution amount varies among employees, the plan could fail to comply with nondiscrimination rules.

Also, for a health FSA to qualify as an excepted benefit, the maximum benefit payable for the year must not exceed:

- Two times the employee's health FSA salary reduction election for the year, or
- If greater, the amount of the employee's health FSA salary reduction election for the year plus $500.

A health FSA's failure to qualify as an excepted benefit may subject you to potential penalties under the Affordable Care Act and could trigger additional obligations under COBRA and other laws.

Health FSAs funded exclusively by employee salary reductions (with annual coverage capped by the amount of the annual salary reduction election) will, by definition, satisfy the "maximum benefit payable" condition described above. But if employer contributions can also be allocated to employees' health FSAs, care must be taken to ensure those contributions don't cause the health FSA to fail to meet the condition.

Finally, remember that employer contributions that an employee can also elect to receive in cash or as a taxable benefit are treated as salary reductions for purposes of the "maximum benefit payable" condition, and that other requirements must also be met for a health FSA to qualify as excepted.

Tap the brakes: Cadillac tax delayed, but challenges remain

As 2015 was winding down, Congress pushed back the effective date of the "Cadillac tax" two years. The much-debated provision of the Affordable Care Act (ACA) will now take effect on January 1, 2020, instead of January 1, 2018.

As originally conceived, the Cadillac tax was supposed to affect only particularly generous, or "luxury," health care plans. But many analysts believe it will, either immediately or eventually, impact quite a few "nonluxury" plans as well. For employers, the immediate road ahead is now free of a particularly looming threat. But, before you get too excited, tap the brakes: There are still plenty of health care challenges with which to contend.

Deductibility of the Tax

Most Cadillac tax opponents hope that, when the delayed 2020 effective date draws near, Congress will do away with it entirely. And they just might get their wish. There's much opposition in Congress to the provision, and now opponents outside of government have two more years to press for full repeal.

But, even if the Cadillac tax isn't fully repealed, the 40% excise levy will now be a pretax expense when it goes into effect. This change was folded into the Consolidated Appropriations Act of 2016.

Threshold Index Reform

Another bit of good news is that the indexing of the Cadillac tax triggering thresholds will continue, even as the effective date of the provision itself is delayed. Critics of the original indexing formula complained that it wouldn't have reflected the actual increases in the cost of health care benefits. And this disparity was highlighted in an analysis by the Kaiser Family Foundation last year.

The value of employer-sponsored coverage for Cadillac tax purposes includes not only the health care plan itself, but also:

- Employer and employee contributions to Flexible Spending Accounts,
- Employer (and possibly employee; this question is unresolved) contributions to Health Savings Accounts,
- On-site medical clinics, and
- Many other forms of coverage.

The Kaiser study projected that, by 2018, when Cadillac tax thresholds were scheduled to be $10,200 for self-only coverage and $27,500 for other than self-only coverage, 26% of employers would have faced Cadillac tax penalties if they didn't make substantial plan design changes. This percentage was projected to rise to 42% by 2028. So, in addition to pushing back the effective date to 2020, Congress authorized the Comptroller General of the United States and the National Association of Insurance Commissioners to analyze whether the indexing formula can be made more accurate.

Cost-Saving Opportunities

For now, employers still face the same pressure that they would have faced even if Congress hadn't acted: keeping their health care costs from escalating ever higher. Many forward-looking organizations are focusing on the following opportunities:

Redoubling efforts to improve employee health. Newer plan designs—such as integrated health care models that tie together basic medical services with dental, vision, behavioral health and disability management—hold promise for cutting costs through improved care coordination.

Imposing spousal surcharges. By applying higher cost-sharing formulas, many employers are discouraging spousal coverage when a spouse can be covered under another employer's plan.

Exploring defined-contribution plan design. Some employers are looking to set fixed limits on their shares of employees' health costs, as they do in the retirement plan realm with 401(k) plans. The challenge, of course, is doing so without violating the ACA's minimum value requirements.

Emphasizing employee engagement. Many employers are bolstering efforts to motivate employees to assume greater responsibility for choosing their health care providers on the basis of quality data and reasonable costs.

The Necessity of Balance

The delay of the Cadillac tax's imposition gives you some breathing room in evaluating and designing your health care plan. And the possibility of its permanent repeal should give you some hope.

But, in the meantime, the burden of staying compliant with a myriad of other ACA provisions remains heavy. Work closely with your financial and benefits advisors to balance the necessity of providing meaningful benefits to your employees with the business imperative of managing the costs of doing so.

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In brief: 2015 health coverage forms

This year, you may receive one or more forms that provide information about your 2015 health coverage:

- **Form 1095-A** (Health Insurance Marketplace Statement) provides information about your health care coverage if you or someone in your family enrolled in coverage through the Health Insurance Marketplace, as well as information necessary to calculate the premium tax credit (PTC).
- **Form 1095-B** (Health Coverage) provides information about your health care coverage if you, your spouse, or your dependents enrolled in coverage through an insurance provider or self-insured employer last year.
- **Form 1095-C** (Employer-Provided Health Insurance Offer and Coverage Insurance) provides information about the health coverage offered by your employer. In some cases, it may also provide information about whether you enrolled in this coverage.

(Please note, Forms 1095-B and 1095-C are not required to file your 2015 tax return.)

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Doing so creates an employer payment plan that violates the ACA's prohibition on annual dollar limits, as well as the requirement to provide coverage of preventive services. Violating these provisions can result in substantial excise taxes.

Moreover, the proposed incentive might raise concerns under HIPAA's privacy rule if you're considered to be using protected health information (in this case, health or claims history) for a purpose unrelated to plan administration (that is, to identify employees eligible for the cash incentive). Other federal laws, such as the Americans with Disabilities Act or the Age Discrimination in Employment Act, could also be implicated.

Wrong way

When considering going this route with your health care plan, it's best to imagine one of those "wrong way" signs you see while driving. Despite your good intentions, you'll quickly find yourself headed straight for some serious compliance issues.