The ERISA Industry Committee

July 15, 2011

Submitted by e-mail:
Notice.comments@irscounsel.treas.gov

Internal Revenue Service
CC:PA:LPD:RU (Notice 2011-28)
Room 5203
P.O. Box 7604
Ben Franklin Station
Washington, DC 20224

Attention: Notice 2011-28 (Interim Guidance on Reporting the Cost of Group Health Insurance Coverage)

Ladies and Gentlemen:

The ERISA Industry Committee ("ERIC") is pleased to respond to the request of the Internal Revenue Service (the "Service") and Treasury Department (collectively, the "Agencies") for comments regarding the interim guidance in Notice 2011-28 implementing the requirements for reporting the cost of group health plan coverage on Forms W-2.

ERIC's Interest in the Interim Guidance

ERIC is a nonprofit association committed to the advancement of the employee retirement, health, and other welfare benefits of America's largest employers. ERIC's members sponsor some of the largest private group health plans in the country. These plans provide health care to tens of millions of workers and their families.

ERIC's members are committed to, and known for, providing high quality, affordable health care. Employers do not have unlimited resources to spend on health care, however. ACA has imposed a number of expensive new mandates on employer health plans, and has significantly increased the administrative burden and cost of operating these plans. ERIC's members have a vital interest in ensuring that the new reporting requirements do not impose unnecessary administrative burdens and costs on large employers. ERIC offers several recommendations below to help achieve these objectives.

1400 L Street, N.W.
Suite 350
Washington, DC
20005
T (202) 789-1400
F (202) 789-1120
www.eric.org

Comments on the Interim Guidance

The Patient Protection and Affordable Care Act ("ACA") added section 6051(a)(14) to the Internal Revenue Code (the "Code"). Section 6051(a)(14) generally requires employers to report the aggregate cost of applicable employer-sponsored coverage on Forms W-2. This new reporting requirement is intended to provide information to employees regarding the cost of their health care coverage in comparison to health coverage that they could purchase in the individual market, including through a health insurance exchange. The reported cost is solely for the employee's information: the reporting requirement does not affect the tax treatment of the employee's coverage or provide information the Internal Revenue Service needs for the proper administration of the federal income tax laws.

The new information reporting requirement imposes a substantial burden on employers. In order to comply with the requirement, the employer must calculate the cost of the group health coverage. This calculation is difficult for the sponsors of self-insured group health plans, and is made more so by the fact that the Service has provided no guidance on the assumptions or methodology the employer should use.[1] Although the employer may use the COBRA premium as a guide, an employer that charges less than the full COBRA premium is not required to determine the amount of the COBRA premium with precision. As Notice 2011-28 recognizes,[2] these employers will have to perform a special calculation in order to determine the reportable cost of their health coverage.

In addition, employers will have to establish a data-reporting connection between the recordkeeping systems of their health plans' third-party administrators and the systems of their payroll administrators in order to transfer information concerning the cost of coverage to the Forms W-2 of covered employees. Employees who add or drop coverage during the year, who add or drop dependents, or who move from one group health plan to another will present special challenges.

Recognizing the difficulties that employers will face in complying with the new reporting requirement, the Agencies have postponed the reporting deadline by a year and have created a number of exclusions and transition rules in Notice 2011-28. ERIC commends the Agencies for providing this relief and urges them to expand the relief to the situations identified in this letter.

---

[1] I.R.C. § 4980B(f)(4)(B)(i) says that for purposes of establishing the COBRA premium, the cost of self-insured group health coverage is determined on an actuarial basis "and takes into account such factors as the Secretary may prescribe in regulations." In the twenty-five years since COBRA was enacted, the Service has not issued regulations interpreting this requirement.

[2] Notice 2011-28, Q/A-27.

1. An employer should not be required to include the cost of health coverage on Forms W-2 provided to retirees.

ERIC strongly endorses the Agencies' position that an employer should not be required to issue a Form W-2 to retirees or other former employees merely to disclose the cost of the retirees' group health coverage.[3] Under Notice 2011-28, however, this exclusion applies only if the retiree[4] does not otherwise receive compensation that is reported on Form W-2. ERIC urges the Agencies to expand the exclusion so that employers are not required to report the cost of group health coverage on Forms W-2 that are provided to retirees merely to report compensation received after their severance from employment.

Many retirees receive no Form W-2 from their former employer, even though they might receive substantial post-retirement compensation that is included in gross income. For example, if a retiree receives pension payments exclusively from a tax-qualified retirement plan, the payments will be reported on Form 1099-R, and the retiree will not receive information concerning the cost of his or her employer group health plan coverage. In contrast, if a retiree receives pension payments partly from a tax-qualified plan and partly from a nonqualified excess benefit plan, the nonqualified plan payments will be reported on a Form W-2. In the latter case, Notice 2011-28 requires the employer to report the cost of the retiree's group health coverage on the Form W-2. As a result, the employer must report the cost of group health coverage for some retirees and not others even though the retirees participate in the same group health plan.

It will be especially difficult for the employer to satisfy the reporting requirement for retirees who only occasionally receive compensation reportable on Form W-2. For example, many employers permit retirees to exercise nonqualified stock options for a number of years after their retirement. Retirees who receive no Form W-2 compensation in most years might occasionally exercise an option and receive a Form W-2 reporting the option income. In a group health plan covering thousands of retirees, the employer will have to create a special system for identifying the unpredictable instances in which a retiree receives Form W-2 income, and will have to create a data-reporting connection between the retiree health plan administrator's recordkeeping system and the employer's payroll system solely to deal with these isolated cases.

The Agencies have already determined that it is not necessary for the majority of retirees to receive information regarding the cost of employer-sponsored group health coverage on a Form W-2. There is no policy justification for requiring employers to report the cost of employer-sponsored health coverage to retirees merely because the

---

[3] Notice 2011-28, Q/A-9.

[4] For ease of discussion, the term "retirees" means retirees and other former employees.

retirees happen to receive post-retirement payments that are reportable on Form W-2. This is true especially in cases where the retirees receive Form W-2 compensation only occasionally, such as from the exercise of a nonqualified stock option or a lump-sum distribution from a nonqualified deferred compensation plan. No purpose is served by showing the retiree the cost of his or her employer group health coverage in the few years when the retiree receives a Form W-2, but not in other years.

ERIC is concerned that if employers report the cost of group health coverage on Forms W-2 issued to retirees, the retirees will find the information confusing rather than helpful. In contrast to active employees, who are used to seeing non-taxable amounts (such as HSA contributions and deferred compensation accruals) reported on their Forms W-2, retirees generally receive Forms W-2 exclusively to report amounts that are includable in their gross income for federal income tax purposes. Many retirees will mistakenly conclude that the cost of employer-provided health coverage reported on their Form W-2 represents a taxable cost. Moreover, many payroll vendors do not issue Forms W-2 in a manner that would permit employers to enclose an explanation of the new information with Forms W-2 issued to retirees.

If the Agencies require employers to report the cost of employer group health coverage on Forms W-2 issued to retirees, the requirement will impose substantial burdens on employers, particularly due to the sporadic nature of the reporting requirement with respect to retirees, and will confer little or no benefit on retirees. Employers that provide health coverage for their retirees already face significant administrative burdens and financial challenges. ERIC urges the Agencies not to add to these burdens by requiring employers to report the cost of group health coverage on Forms W-2 issued to their retirees merely to report post-separation payments made to their retirees.

2. An employer should not be required to report the cost of health coverage to retirees who receive Forms W-2 solely to report taxable group term life insurance coverage.

If, contrary to ERIC's recommendation, the Agencies continue to require employers to report the cost of group health coverage on Forms W-2 issued to their retirees, the Agencies should recognize that this requirement does not apply to retirees who receive Forms W-2 solely to report the cost of taxable group term life insurance coverage.

The new reporting requirement for employer-provided medical coverage appears in section 6051(a) of the Code. Under section 6051(a), an employer is required to issue a Form W-2 for post-employment compensation if the employer is required to withhold federal income tax or employment tax from payments made to a retiree. The cost of taxable group term life insurance coverage provided to a retiree is not subject to withholding, however, and thus is not reportable directly under section 6051.

Instead, the cost of taxable group term life insurance is reportable on a Form W-2 issued to a retiree as part of a withholding exemption provided under section 3102(d) of the Code.

Taxable group term life insurance is not subject to federal income tax withholding or to federal unemployment tax.[5] Before 1988, taxable group term life insurance also was not subject to federal employment ("FICA") tax. In 1987, however, the Omnibus Budget Reconciliation Act of 1987 amended section 3121(a)(2)(C) of the Code to provide that the amount of any "payment made" to purchase taxable group term life insurance coverage for an employee or former employee would be treated as wages for FICA purposes.[6]

Employers protested that they had no way to withhold a retiree's share of FICA tax on taxable group term life insurance, since the retiree usually did not receive any cash payments from which the employer could deduct the tax. In response, Congress enacted section 3102(d) of the Code as part of the Omnibus Budget Reconciliation Act of 1990.[7] Under section 3102(d), an employer is not required to withhold employment tax from taxable group term life insurance coverage provided to a retiree. Instead, the employer must issue a Form W-2 to the retiree reporting the cost of the life insurance coverage and the retiree's share of FICA tax owed with respect to the coverage. The retiree is responsible for paying the FICA tax with respect to the life insurance coverage.

The new reporting requirement for the cost of employer health plan coverage applies only when the employer is required by section 6051(a) to issue a Form W-2 to an individual. An employer is required by section 6051(a) to issue a Form W-2 to a retiree only when the employer makes a payment that is subject to federal income tax withholding under section 3402 of the Code, or when the employer makes a payment that is subject to FICA tax withholding under section 3101 of the Code. As we have explained above, neither of these withholding requirements applies to taxable group term life insurance. Although the cost of taxable retiree life insurance is reported on Form W-2, this requirement arises under the withholding exemption in section 3102(d). Accordingly, ERIC urges the Agencies to make clear that an employer is not required to include the cost of employer group health coverage on any Form W-2 that is issued to a retiree solely to report the cost of taxable group term life insurance coverage under section 3102(d) of the Code.

---

[5] I.R.C. §§ 3401(a)(14), 3306(b)(2).

[6] Pub. L. No. 100-203, § 9003(a)(2) (1987). A technical correction limited this provision to employees who retired after 1988. Pub. L. No. 100-647, § 8013(a) (1988).

[7] Pub. L. No. 101-508, § 5124(a) (1990).

3. A dental or vision plan should be exempt from the reporting requirements if the facts and circumstances indicate that the plan is not an integral part of a group health plan.

Section 6051(a)(14) requires employers to report the aggregate cost of applicable employer-sponsored coverage within the meaning of section 4980I(d)(1) of the Code. Section 4980I(d)(1) generally defines applicable employer-sponsored coverage to include any group health coverage; but this section excludes certain coverage that is exempt from the requirements of the Health Insurance Portability and Accountability Act ("HIPAA"), including insured dental and vision coverage.

Notice 2011-28 also excludes from the aggregate reportable cost one additional type of HIPAA-excepted coverage: self-insured dental plans or vision plans that are not integrated into a group health plan.[8] The current test for determining whether a self-insured dental or vision plan is "integral" to a group health plan is too narrow, however. The Agencies should expand the test to recognize a broader range of circumstances in which an employer provides self-insured dental or vision benefits that are not integral to a group health plan.

Regulations interpreting the meaning of "integral part of the plan" were issued by Treasury, the Department of Labor ("DOL"), and the Department of Health and Human Services ("HHS") in 2004 for purposes of determining whether a dental or vision plan is exempt from HIPAA. Under the regulations, benefits are not an integral part of a group health plan only if (1) participants have the right to elect not to receive coverage for the benefits (the "opt-out" requirement); and (2) if a participant elects to receive coverage for the benefits, the participant pays an additional premium or contribution for the coverage (the "additional premium" requirement).[9]

The opt-out and additional premium requirements are an appropriate safe harbor for establishing that the dental or vision benefits are not integral to a group health plan, but they should not be the exclusive test for identifying non-integral benefits. The existing regulations fail to accommodate other circumstances under which the lack of integration is equally clear.

For example, suppose that a collective bargaining agreement requires an employer to pay the full cost of limited scope dental benefits, without regard to whether the employee elects to participate in a separate group health plan. Coverage under the dental plan is automatic, but employees have a right to decline coverage under the group health plan and employees who elect coverage under the group health plan must pay an additional premium for the health plan coverage. In this case, the dental

---

[8] Notice 2011-28, Q/A-20.

[9] Treas. Reg. § 54.9831-1(c)(3)(ii); 29 C.F.R. § 2590.732(c)(3)(ii); 45 C.F.R § 146.145(c)(3)(ii).

benefits plainly are not an integral part of the group health plan; and yet the dental benefits do not satisfy the opt-out requirement or the additional premium requirement.

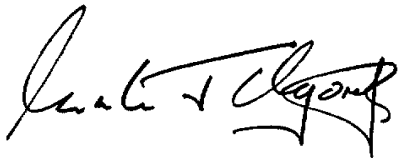
Similarly, suppose that a collective bargaining agreement requires an employer to pay the full cost of limited scope vision benefits to employees who enroll in the employer's group health plan. The coverage under the vision plan is automatic, but the cost of the coverage is not included in the premium charged for the group health plan. Participants have the right to elect not to receive the vision benefits by electing not to use them. The vision benefits plainly are not an integral part of the group health plan; and yet the vision benefits do not satisfy the additional premium requirement, and do not clearly satisfy the opt-out requirement.

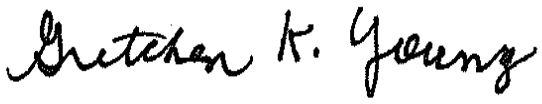
Under these facts, the line between the dental plan or vision plan and the group health plan is as clear as if the regulatory requirements were satisfied. Moreover, Treasury, DOL, and HHS have made clear that the plans in these examples will not be treated as an integral part of the group health plan if employees are charged even a nominal premium for electing dental or vision coverage (or, conversely, receive a nominal amount for opting out of the coverage).[10]

Neither the statute nor sound policies justify an outcome that turns solely on whether the employer charges a nominal fee (e.g., $0.01) for the coverage or requires the participant to make an affirmative election to receive or decline the coverage. The regulations should be revised to make clear that the exception for limited scope dental and vision benefits covers arrangements where the facts and circumstances indicate that the dental or vision coverage is not an integral part of the group health plan.

ERIC appreciates the opportunity to provide comments on Notice 2011-28 and the interim guidance on reporting the cost of group health coverage. If the Agencies have any questions concerning our comments, or if we can be of further assistance, please let us know.

Sincerely,





Mark J. Ugoretz
President

Gretchen K. Young
Senior Vice President, Health Policy

---

[10] FAQs About the Affordable Care Act Implementation Part II, Q&A-6, http://www.dol.gov/ebsa/faqs/faq-aca2.html (October 8, 2010).