IslerDare PC

EMPLOYEE BENEFITS UPDATE

March 30, 2018

Recent Health and Welfare Guidance Affecting Health Plans and Insurance Coverage

Executive Summary

This year is already shaping up to be an interesting year for employer-sponsored health and welfare plans, and for individual health insurance coverage. Highlights include:

- The Internal Revenue Service ("IRS") issued guidance that reduced the Health Savings Account ("HSA") limits for family coverage for 2018 by $50, from $6,900 to $6,850.
- In response to recent state law requirements to provide male sterilization and male contraceptive benefits without cost-sharing, the IRS issued guidance providing transition relief for high-deductible health plans ("HDHPs") for periods before 2020.
- Congress has again delayed the "Cadillac" tax, this time until 2022.
- The Departments of Treasury, Labor, and Health and Human Services have issued a proposed rule that increases the length of time for which individuals can purchase short-term, limited-duration health insurance, to a maximum period of 12 months.
- The Department of Labor ("DOL") has proposed a rule that would relax the requirements for employer groups or associations to combine and form association health plans ("AHPs") and offer employee benefits to employees.

What You Should Do

- Communicate with any employees who have elected to contribute, or have already contributed, more than the reduced family coverage amount to an HSA for 2018. Work with these employees to change their elections or communicate with their HSA custodian so that their 2018 HSA contributions do not exceed the lowered limit.
- Continue to monitor the legislative and regulatory changes and determine whether those changes impact your health plans or your employee population.

IRS Reduces 2018 HSA Limits for Family Coverage

On March 5, 2018, the IRS released *Revenue Procedure 2018-18*, which lowered the annual HSA contribution limit for 2018 for family coverage by $50, from $6,900 to $6,850. The 2018 HSA contribution limit for individual coverage remains unchanged at $3,450. The updated limit was changed to reflect new inflation adjustments that were required by the recent tax reform legislation that was enacted in December 2017.

Because this change is occurring mid-year, after payroll and human resource information systems have already been programmed to incorporate the $6,900 limit, it raises practical and administrative issues for employers, HSA administrators, and individuals who are enrolled in HSA family coverage. However, there is still time to respond to this change for 2018.

- Employers should inform employees about the reduced HSA contribution limit and work with employees who elected to max out the HSA family coverage limit so that they can change their elections and avoid exceeding the limit.

- Employees who have already contributed $6,900 to an HSA for 2018 should work with their HSA custodian to request a distribution of the excess $50 in order to avoid potential adverse taxes on "excess" amounts that are contributed to an HSA.

IRS Provides Transition Relief for HDHPs Providing Male Sterilization without Cost-Sharing

Some states, including Maryland, have enacted laws that require health insurance policies to provide benefits for male sterilization or male contraceptives as a preventive benefit, without a deductible or other cost-sharing. These state laws have raised questions for employers as to whether their insured health plans will be able to qualify as HSA-compatible HDHPs, because male sterilization and male contraceptives are not preventive services under the Affordable Care Act (the "ACA").

In *Notice 2018-12*, the IRS clarified that health plans that provide benefits for male sterilization or male contraceptives without a deductible, or with a deductible below the minimum deductible level that is needed in order for a health plan to qualify as an HDHP, will not qualify as HDHPs under IRS guidance. However, the Notice does provide transition relief for periods before 2020. Under the transition relief, individuals who live in states with these laws will be able to have coverage under the HDHPs that provide male contraceptive benefits without cost-sharing, and will still be able to deduct HSA contributions in 2018 and 2019. The transition relief is intended to give affected states time to change their laws.

Legislation Delays the ACA's "Cadillac" Tax

On January 22, 2018, President Trump signed the *Federal Register Printer Savings Act of 2017*, to fund the federal government until February 8, 2018. The legislation also delayed for the second time the ACA's "Cadillac" tax.

The Cadillac tax is a 40 percent excise tax on the value of employer-sponsored health care coverage that exceeds certain dollar limits. The Cadillac tax has been met with fierce opposition, including from employers who have been surprised to find that it would apply not only to the most extravagant health and welfare arrangements, but also to their current benefit arrangements.

The Cadillac tax was originally scheduled to go into effect on January 1, 2018, but controversy surrounding the tax led to its first two-year delay from 2018 to 2020, and now to its second delay. The Cadillac tax will not be effective until 2022 at the earliest.

Both parties in Congress have expressed support for full repeal of the tax, and this second delay is certainly a welcome relief from the tax. For now, we continue to wait for future developments.

Departments Propose Rule to Expand Short-Term, Limited-Duration Health Insurance

In October 2017, President Trump issued Executive Order 13813, *Promoting Healthcare Choice and Competition Across the United States* (the "Order"), which instructed the Departments of Treasury, Labor, and Health and Human Services to consider proposing regulations or revising guidance to expand the availability of short-term, limited-duration health insurance ("STLDI") and allow STLDI to cover longer periods and be renewed by consumers.

STLDI is health insurance coverage that is designed to provide temporary health insurance coverage to fill a gap when the individual is transitioning from one health plan to another plan. STLDI is exempt from the ACA's definition of "individual health insurance coverage," and is not subject to many of the ACA's protections. For this reason, STLDI plans can offer cheaper coverage than comprehensive plans that meet the ACA's requirements but that are commonly referred to as "skimpy" insurance plans because of the limited benefits they provide.

In response to the Order, the Departments issued a proposed rule on February 20, 2018, which would extend the maximum period of time that an STLDI plan can be offered, from the current maximum period of three months to a new maximum period of up to 12 months. The proposed rule also requires that STLDI policies include a prominently displayed notice in the contract and application materials that notifies individuals that the coverage does not comply with ACA requirements, among other things.

The Centers for Medicare and Medicaid Services (CMS) is accepting comments on the proposed rule until April 23, 2018. The proposed rule would take effect in 2019.

Previously, the popularity of STLDI coverage was limited because of the ACA's individual mandate. However, with the repeal of the individual mandate penalty set to take effect in 2019, and the availability of longer-term STLDI coverage, STLDI plans may increase in popularity in the individual market beginning in 2019.

DOL Proposes Rule to Expand Access to Association Health Plans

The Order also instructed the Department of Labor ("DOL") to consider proposing regulations or revising guidance to expand access to health coverage by allowing more employers to form association health plans ("AHPs") by expanding the conditions that satisfy the "commonality of interest" requirements under existing DOL guidance and to consider promoting AHP formation based on common geography or industry.

In response to the Order, the DOL issued a proposed rule on January 5, 2018, to amend existing regulatory guidance defining "employer" under Section 3(5) of ERISA and allow more employer groups or associations to form as sponsors of multiple employer "employee welfare benefit plans" and "group health plans" under ERISA.

The proposed rule would relax the existing "commonality of interest" test, which requires that a group of employers have a common economic or representation interest unrelated to providing benefits to its employees, and would instead adopt a test that would allow a group to be established by: "(1) Employers being in the same trade, industry, line of business or profession; or (2) Employers having a principal place of business in a region that does not exceed the boundaries of the same State or the same metropolitan area (even if the same metropolitan area includes more than one State)."

The proposed rule includes other requirements for forming an AHP, including, for example, requirements that the AHP have a formal organizational structure with a governing body and bylaws or other similar indications of formality, that the AHP not be a health insurance issuer or owned or controlled by a health insurance issuer, and that the AHP comply with nondiscrimination standards.

One important regulatory implication that has not changed with the new proposed rule is that an AHP is generally classified as a multiple employer welfare arrangement ("MEWA") under ERISA. MEWAs are required to file a Form M-1 with the DOL annually. In addition, self-funded MEWAs are subject to state regulation.

Although the proposed rule is intended to offer small employers and sole proprietors the ability to come together and offer health coverage that is affordable, the potential benefit of AHPs for employers remains unclear because the proposed rule includes extensive requirements and AHPs remain subject to a number of regulations.

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If you would like to discuss these developments and how they may impact your health and welfare plans, or if you'd like to discuss your employee benefit plans generally, please feel free to contact the members of our Employee Benefits group below.

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