

HEALTH CARE REFORM: ISSUES TO CONSIDER WITH WAIVERS OF COVERAGE AND CASH-IN-LIEU OF BENEFITS

Many employers allow employees to waive coverage and take cash-in-lieu of benefits. While some employers allow employees to waive coverage for any reason, others require employees to certify they have other health coverage (e.g., through a spouse's employer-sponsored group plan). Waivers of coverage and cash-in-lieu of benefits raise several issues that employers must address, such as tax consequences to employees if cash-in-lieu is offered outside of a cafeteria plan. The Affordable Care Act (ACA) added some new considerations into the mix that employers must take into account. This *Briefing* discusses these issues along with suggestions for addressing them.

APPLICABLE LARGE EMPLOYERS AND WAIVERS OF COVERAGE

An Applicable Large Employer (ALE) may be subject to a penalty if it does not offer at least 95 percent of its full-time employees minimum essential coverage (MEC) that is affordable and provides minimum value (MV). To be considered an offer of MEC, an employee must be given an effective opportunity to enroll in or decline coverage. However, an effective opportunity to decline is not required if the offer of MEC providing MV is offered at either: (1) no cost to the employee, or (2) if the employee's required monthly contribution for the lowest cost self-only coverage does not exceed 9.5 percent of the federal poverty line for a single individual for the calendar year, divided by 12 (i.e., \$93.18 per month for 2016).

If the employee's required contribution is more than \$93.18 per month for 2016, the ALE must allow employees to decline coverage and they must be able to decline for any reason. If the waiver is conditioned upon proof or certification of other coverage, it makes it impossible for the employee to decline coverage for any reason. As a result, the ALE can be treated as though it did not make an offer of MEC to these employees under the Employer Mandate, which could impact the ALE meeting the 95 percent threshold.

Although current guidance from the Internal Revenue Service (IRS) does not directly address this issue, it appears that employers may establish a two-tiered policy giving employees an option to: (1) waive coverage for any reason, without proof or certification of other coverage, but not receive cash-in-lieu, or (2) waive coverage with proof or certification of other group health coverage and receive cash-in-lieu. This type of policy will allow the ALE to comply with the requirements of the Employer Mandate but also limit cash-in-lieu to those with other group health coverage.

Action to Take

You should review your waiver of coverage and cash-in-lieu policies to ensure you are in compliance with this part of the Employer Mandate. If your waiver policy is conditioned upon certification of other coverage and employees are required to contribute more than \$93.18 per month towards the cost of coverage in 2016, then you should consider establishing the two-tiered policy discussed above.

PROOF OF OTHER COVERAGE SHOULD NOT INCLUDE INDIVIDUAL POLICIES

If cash-in-lieu is conditioned on proof or certification of other coverage, then it should not include individual coverage in order to avoid creating an “Employer Payment Plan.” Under these plans, which are now impermissible under the ACA, employers could reimburse employees substantiated premiums for non-employer sponsored coverage and those payments would be excluded from the employee’s gross income under Internal Revenue Code section 106. In Notice 2015-17, the IRS confirmed that if an increase in employee compensation, such as that received through cash-in-lieu, is conditioned on proof of individual coverage then it creates an impermissible “Employer Payment Plan.”

Action to Take

You should review and revise, if necessary, plan documents, waiver of coverage forms and any employee communications to clearly state that cash-in-lieu is not available upon proof or certification of individual coverage. You also want to avoid using vague language that refers generally to “other coverage” without specifying group health coverage, Medicare, etc. as it could be interpreted to include individual coverage.

CASH-IN-LIEU AND AFFORDABILITY

As a reminder, the IRS has yet to issue direct guidance addressing the impact cash-in-lieu of benefits will have on determining whether coverage is affordable under the Employer Mandate. However, there is indirect guidance that many believe reveals how the IRS will treat cash-in-lieu for determining affordability. For more information on this guidance and a discussion of the issues, please see the following *Briefing*:

http://www.keenan.com/news/brief/2015/BRF_20150824_HCRCashInLieu_KA.pdf

FINAL CONSIDERATIONS

The issues surrounding waivers of coverage and cash-in-lieu of benefits have grown in complexity under the ACA. Accordingly, employers should review their policies and consult with legal counsel, if necessary, to ensure they are in compliance and to avoid potential penalties.

Please contact your Keenan Account Manager for questions regarding this *Briefing* or if you require any additional information regarding the Affordable Care Act.

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