

HEALTH CARE REFORM: FLEX CREDITS AND AFFORDABILITY UNDER THE EMPLOYER MANDATE

Under the Affordable Care Act, an Applicable Large Employer may be subject to a penalty if it does not offer its full-time employees affordable, minimum value (MV) coverage. The Internal Revenue Service (IRS) recently issued Notice 2015-87 that addresses how employer flex credits are treated when determining if coverage is affordable.

An employee's required contribution for the lowest cost self-only coverage that provides MV will be reduced by the amount of an employer's flex credits if they are "health flex contributions." To be a "health flex contribution," the following requirements must be met:

1. The employee may not opt to receive the amount as a taxable benefit (e.g., cash);
2. The employee may use the amount to pay for minimum essential coverage (MEC); and
3. The employee may use the amount only to pay for medical care within the meaning of Internal Revenue Code (IRC) section 213.

If the flex credits do not meet these requirements, then they are not "health flex contributions" and will not reduce an employee's required contribution. The following examples demonstrate how these requirements may impact whether an employee's coverage is affordable:

EXAMPLE 1 – EMPLOYER FLEX CREDIT AVAILABLE ONLY FOR MEC OR MEDICAL CARE

Facts: Employer offers employees coverage under a group health plan through a §125 cafeteria plan. The total monthly premium for the lowest cost self-only coverage that provides MV is \$400 per month. Employer offers flex credits of \$250 per month for the plan year that can only be applied toward group health coverage or contributed to a health flexible spending arrangement (health FSA).

Conclusion: The \$250 employer flex credit is a "health flex contribution" because it can be used only to pay for MEC or medical care within the meaning of IRC section 213. Since the \$250 employer flex credit is a "health flex contribution," the \$250 is treated as an employer contribution and, therefore, reduces the employee's required contribution regardless of whether the employee elects to apply the "health flex contribution" toward the group health coverage or elects to contribute it to the health FSA.

For purposes of the Employer Mandate "B" penalty and the related reporting on Line 15 of IRS Form 1095-C, the employee's required contribution for the group health coverage is \$150 per month (\$400 total monthly premium – \$250 "health flex contribution").

EXAMPLE 2 – EMPLOYER FLEX CREDIT AVAILABLE FOR ANY BENEFIT UNDER §125 CAFETERIA PLAN

Facts: Employer offers employees coverage under a group health plan through a §125 cafeteria plan. The total monthly premium for the lowest cost self-only coverage that provides MV is \$400 per month. Employer offers flex credits of \$250 per month for the plan year that can be used for **any** benefit under the §125 cafeteria plan, including benefits not related to health. The flex credits are not available as cash.

Conclusion: Because the employer flex contribution can be used for benefits other than medical care, it is not a “health flex contribution” and does not reduce the employee’s required contribution. For purposes of the Employer Mandate “B” penalty and the related reporting on Line 15 of IRS Form 1095-C, the employee’s required contribution is \$400 per month.

EXAMPLE 3 – EMPLOYER FLEX CREDIT AVAILABLE AS CASH

Facts: Assume the same facts as in Example 2 except that the employee can also elect to receive the \$250 employer flex credit as cash or other taxable compensation.

Conclusion: Because the \$250 employer flex contribution can be taken as cash or used for benefits other than medical care, it is not a “health flex contribution.” The flex contribution, therefore, does not reduce the employee’s required contribution. For purposes of the Employer Mandate “B” penalty and the related reporting on Line 15 of IRS Form 1095-C, the employee’s required contribution is \$400 per month.

EXAMPLE 4 – PORTION OF EMPLOYER FLEX CREDIT LIMITED TO MEC OR MEDICAL CARE

Facts: Employer offers employees coverage under a group health plan through a §125 cafeteria plan. The total monthly premium for the lowest cost self-only coverage that provides MV is \$400 per month. Employer offers flex credits of \$600 per month for the plan year. \$250 of the flex credits can only be applied toward group health coverage or contributed to a health FSA. The remaining \$350 in flex credits can be used for any benefit under the §125 cafeteria plan, including benefits not related to health, or can be taken as cash.

Conclusion: The \$250 employer flex credit is a “health flex contribution” because it can be used only to pay for MEC or medical care within the meaning of IRC section 213. Since the \$250 employer flex credit is a “health flex contribution,” the \$250 is treated as an employer contribution and, therefore, reduces the employee’s required contribution regardless of whether the employee elects to apply the “health flex contribution” toward the group health coverage or elects to contribute it to the health FSA. Because the \$350 employer flex contribution can be used for benefits other than medical care or taken as cash, it is not a “health flex contribution” and does not further reduce the employee’s required contribution.

For purposes of the Employer Mandate “B” penalty and the related reporting on Line 15 of IRS Form 1095-C, the employee’s required contribution for the group health coverage is \$150 per month (\$400 total monthly premium – \$250 “health flex contribution”).

EFFECTIVE DATE OF GUIDANCE

For plan years beginning before January 1, 2017, employer flex credits that do not qualify as a “health flex contribution” can be treated as reducing the amount of an employee’s required contribution for purposes of the

Employer Mandate “B” penalty and the related reporting on Line 15 of IRS Form 1095-C. However, this is only available for flex credit arrangements adopted on or before December 16, 2015. A flex credit arrangement will be treated as being adopted after December 16, 2015 unless: (1) the employer offered the flex credit arrangement (or a substantially similar flex credit 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 flex credit 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 credit arrangement would be offered to employees at some time in the future.

NEXT STEPS

Clients with flex credit arrangements should evaluate the impact of this guidance on the affordability of their lowest cost self-only coverage that provides MV for plan years beginning on or after January 1, 2017. If the guidance makes the coverage unaffordable, clients should consider eliminating the cash-out option and limiting the use of flex credits for MEC or IRC section 213 medical expenses so that the arrangement qualifies as a “health flex contribution.”

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

Keenan & Associates is not a law firm and no opinion, suggestion, or recommendation of the firm or its employees shall constitute legal advice. Clients are advised to consult with their own attorney for a determination of their legal rights, responsibilities and liabilities, including the interpretation of any statute or regulation, or its application to the clients’ business activities.