HEALTH CARE REFORM: PROPOSED REGULATIONS ISSUED ON OPT-OUT PAYMENTS

Under the Affordable Care Act (ACA), 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 proposed regulations outlining how employers must treat opt-out payments (i.e., cash-in-lieu of benefits) when determining if their coverage is affordable under the Employer Mandate. Under these arrangements, an employee is offered group health coverage but can "opt out" and get cash instead.

"UNCONDITIONAL" ARRANGEMENTS – EMPLOYER DOES NOT REQUIRE PROOF OF OTHER COVERAGE

An amount offered as cash-in-lieu under an "unconditional" arrangement must be **included** as part of an employee's required monthly contribution for the cost of coverage.

For example, assume the employee's required monthly contribution for the lowest cost self-only coverage that provides MV is $100 per month but employees can take $150 as cash-in-lieu of benefits. For affordability purposes, the employee's required contribution is $250 per month. From the IRS's perspective, the true cost of coverage to the employee is $250 because the employee not only has to pay the $100 per month for the coverage but must also give up the $150 in cash.

"CONDITIONAL" ARRANGEMENTS – EMPLOYER REQUIRES PROOF OF OTHER COVERAGE

For cash-in-lieu arrangements that require proof of other coverage, the amount offered as cash can be **excluded** as part of an employee's required monthly contribution for the cost of coverage **only** if it is an "eligible opt-out arrangement."

An "eligible opt-out arrangement" is one in which the employee's right to payment is conditioned on:

1. Declining to enroll in employer-sponsored coverage, and

2. Providing reasonable evidence that the employee and all members of the employee's expected tax family (i.e., all individuals for whom the employee reasonably expects to claim a tax deduction) have or will have minimum essential coverage (other than individual coverage) during the period covered by the opt-out arrangement.

For example, if an employee's expected tax family consists of the employee, spouse and two children, the employee needs to provide reasonable evidence that the employee, the spouse and the two children will have other coverage (e.g., under the spouse's employer-sponsored group health plan) for the period to which the cash-in-lieu arrangement applies.

Reasonable evidence can include the employee's attestation that all members of the employee's family have or will have minimum essential coverage, **excluding** individual coverage, for the applicable period. Alternatively, they can provide other reasonable evidence, such as documentation showing proof of other coverage. Evidence

of other coverage must be requested within a reasonable period before the start of the plan year and provided at least once per plan year. Collecting this evidence during the annual open enrollment will meet this requirement.

Proof of other coverage can include group coverage, such as the spouse's employer-sponsored plan, and government-sponsored programs, such as Medicare, Medicaid and TRICARE. It **cannot** include coverage under an individual policy, regardless of whether it is purchased on or off the Exchange.

Effective Date

The guidance is effective starting the first day of the 2017 plan year for arrangements adopted prior to December 16, 2015. Employers with collective bargaining agreements that require opt-out arrangements may have additional time to come into compliance. For these employers, the effective date is the later of: (1) the first day of the 2017 plan year or (2) the start of the first plan year that begins following the expiration of the collective bargaining agreement in effect before December 16, 2015 (disregarding any extensions on or after December 16, 2015).

Next Steps

Employers with "conditional" opt-out arrangements should review their policies and procedures to ensure they meet the requirements of an "eligible opt-out arrangement" for the 2017 plan year. Employers with "unconditional" opt-out arrangements should evaluate the impact of this guidance on the affordability of their lowest cost self-only coverage that provides MV. If necessary, consider restructuring the arrangement to ensure it is affordable (e.g., by limiting the cash value) or converting to a "conditional" arrangement that meets the requirements of an "eligible opt-out arrangement."

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