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New Agency FAQs Drive a Stake Further into the Heart of Premium Reimbursement Arrangements and Eliminate a Common Executive Perk

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In clear and unambiguous terms, the U.S. Departments of Labor ("DOL") and Health and Human Services and the Internal Revenue Service ("IRS") (the "Agencies") drove a stake into the heart of two suspect health insurance strategies that have been promoted to business owners across the country.   In addition, the guidance may spell trouble for a common reimbursement strategy used by employers for executives and other key employees.

Building upon prior guidance, the Agencies have eliminated any reasonable argument that employers can (i) establish any arrangement in which they reimburse employees for obtaining individual insurance coverage either on the Marketplace or directly from an insurer or (ii) provide incentives to high-cost claimants to drop employer coverage and obtain individual insurance. The guidance, issued on November 6, was released as DOL FAQs Part XXII.

Premium Reimbursement Arrangements

With the advent of Marketplace access for individuals, certain promoters of benefits products pitched to employers an idea that sounded “too good to be true”: eliminate employer sponsored health insurance and establish accounts to reimburse employees for the cost of individual insurance coverage. An employer subject to the “pay-or-play” requirements of the Affordable Care Act (“ACA”) would be subjected to the so-called “A Penalty” of $2,000 per full-time employee, but even factoring in the cost of the non-deductible penalty with the amount of the premium reimbursed, the employer would save premium subsidy and administrative costs.

In September 2013, the DOL and IRS addressed this idea and said that health reimbursement arrangements (HRA) not integrated with a group health plan or employer payment plans (collectively, “premium reimbursement arrangements”) are themselves group health plans and therefore violate the ACA because, among other things, the preventive services and annual limitations requirements could not be met. See DOL Technical Release 2013-03, IRS Notice 2013-54. The September 2013 guidance left open the idea that employers could reimburse individual coverage on a post-tax basis.

The new guidance, however, states that premium reimbursement arrangements are group health plans whether payment or reimbursement is provided on a pre-tax or post-tax basis. Therefore, employers are no longer permitted to reimburse employees or pay insurers directly for individual health insurance policies.

We note that this guidance has far-reaching implications. While the Agencies’ clear focus was on the marketeers who continued to promote these reimbursement strategies after the previous guidance, the inclusion of post-tax arrangements into the mix may well spell trouble for employers who routinely reimburse executives and others for their individual insurance costs. This happens in a number of situations, including when an executive or sales person or other employee lives or has family that lives in a part of the country where the group health plan does not provide good coverage.

Marketplace Dumping

Another suspect recommendation to employers (especially with self-insured plans) is that they identify high-cost claimants and provide a cash incentive for them to drop employer coverage and obtain individual insurance coverage on the Marketplace. Proskauer has been asked to comment on this approach in the past and has noted our belief that the *suggestion* would violate various federal laws, including ERISA’s nondiscrimination rules (added by HIPAA in 1996). In the FAQ, the Agencies note that this practice discriminates based on one or more health factors for two reasons. First, the offer of cash actually *increases* the premium because the individual with an adverse health factor must forgo the cash to elect group health coverage. Thus, the individual with an adverse health factor effectively pays a higher premium than those without the adverse health factor. Second, although the HIPAA nondiscrimination rules allow “benign discrimination” (i.e., discrimination that helps individuals with adverse health factors), this practice discourages enrollment in the group health plan and is, therefore, not benign.

What Employers Should Do

1. Reject any proposal that involves (i) incurring the “A Penalty” and reimbursing individual premium costs or (ii) identifying high-cost claimants and incenting them to move to Marketplace insurance;

2. Those who have are in the process of implementing these strategies should immediately stop and consider consulting with qualified counsel as to whether they might be able to recoup costs incurred; and

3. Immediately evaluate any arrangement in which an executive or other employee is reimbursed (on a pre- or post-tax basis) for individual insurance coverage (**Note**, however, that reimbursements on a pre- or post-tax basis for premiums for other *group health insurance* such as a spouse’s plan or COBRA coverage are still permitted).

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