Health Reform Advisory Practice

LOCKTON

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IRS, HHS Closing the Minimum Value Plan Loophole; Early Adopters Win Transition Relief

The Internal Revenue Service this morning grabbed its hatchet and played pilgrim to what it sees as a fast-growing turkey: health plans claiming to satisfy the Affordable Care Act's (ACA's) "minimum value" health plan standard without covering inpatient hospitalization or physician services.

The IRS issued a Notice providing that neither it nor the Department of Health and Human Services (HHS) will view a plan that fails to provide either of these services as a "minimum value" plan for purposes of the ACA's employer mandate. The IRS noted that it and HHS will soon issue proposed regulations stating as much, and expect to finalize the regulations in the first calendar quarter of 2015.

The news, while not unexpected, throws a wrench into the strategy of some employers who had intended to implement such health plans for the coming year, and raises their risk of ACA-related penalties. However, other employers who have already installed such plans, or contracted to do so, dodge the IRS's hatchet for the coming year. But even these lucky employers don't escape unscathed. If they've already notified employees that the coverage supplies minimum value, the employers must quickly correct that representation.

Background

The ACA requires larger employers to satisfy a two-pronged employer mandate or risk penalties. The first prong requires the employer to offer at least bare-bones "minimum essential coverage" (MEC) to 70 percent or more (95 percent or more after 2015) of its full-time employees and their children. An employee that enrolls in this coverage, even though it might be so skimpy as to offer only preventive care, satisfies the ACA's *individual mandate*.

> ***Lockton Comment:*** If the employer fails this first prong, it pays a penalty of more than $2,000 per year for each full-time worker if a single full-time worker obtains subsidized coverage in a public health insurance exchange.

The second prong of the employer mandate requires the employer to up the ante a bit, and ensure its coverage offer to full-time employees – never mind the children at this stage – has at least a 60 percent actuarial value (minimum value or "MV") and doesn't cost the employee more than 9.56 percent of his or her household income, for employee-only coverage. If the employer offers MV/affordable coverage, the employee is frozen out of subsidies in the exchanges, even if he or she declines the employer's offer.

Lockton Comment: A 60 percent actuarial value means, in layman's terms, that the plan is designed to pay at least 60 percent of expected medical expenses incurred under a normative plan design. It is roughly equivalent to "bronze" level coverage in the public health insurance exchanges. If the employer fails to offer this coverage to a full-time employee, and the employee obtains subsidized health insurance in a public health insurance exchange, the employer pays a penalty of more than $3,000 annually on that employee.

To help employers and insurers determine whether a coverage offering meets the MV standard, HHS released an actuarial value calculator several months ago. Employers and insurers could plug their plan design details into the Excel-based calculator, and the calculator would generate a government-approved actuarial value reading.

"Is it *Supposed* to Do That?"

Unfortunately, an apparent glitch in the data underlying the calculations allowed health plans to attain a 60 percent (or better) actuarial value reading without offering inpatient hospitalization benefits. That apparent flaw in the calculator's methodology ripped a hole in the ACA's conceptual framework that some insurers were quick to exploit.

Insurers began marketing what we call "MV Lite" plans, or plans that lack inpatient benefits, physician benefits or both, but somehow achieve a 60 percent or greater actuarial value result via the calculator. The allure of these plans to some employers was that they could offer the plans at relatively inexpensive price points *and* insulate themselves from potential penalties under both prongs of the employer mandate.

Lockton Comment: The potential downside for the employee was that if he or she wanted to obtain more robust coverage (for example, coverage that includes inpatient hospitalization and physician services) in a public health insurance exchange, he or she would not qualify for subsidies because the employer had offered affordable coverage that apparently met the MV standard, even though it lacked those important benefits.

The Loophole Closes…More Slowly for Some than Others…and with a Catch

This morning's announcement by the IRS means that while employers may still offer the "plans formerly known as MV Lite," they will no longer be considered minimum value under the second prong of the employer mandate.

The plans will *still* satisfy the first prong's MEC standard, however. We might call these plans "MEC heavy" plans, because they're a bit more robust and expensive than the very skinny, preventive-care-only MEC plans. But of course, if such a "MEC heavy" plan is all the employer offers a full-time worker, the employer risks the $3,000 annual penalty if the worker obtains subsidized coverage in an exchange. That's because the employer plan is not MV and thus does not satisfy the second prong of the employer mandate.

What about employers who, relying on the government's own calculator, already implemented or are implementing an MV Lite plan? Good news: If as of yesterday (Nov. 3, 2014) the employer had already enrolled or begun enrolling employees in an MV Lite plan, or entered

into a binding written commitment to adopt one, the IRS will allow the MV Lite offering to insulate the employer from penalties under the second prong of the employer mandate, through the plan year that begins on or before March 1, 2015.

> ***Lockton Comment:*** Good news for employees, too. Effective immediately, and "pending issuance of final regulations," the IRS won't view the employer's offer of MV Lite coverage as disqualifying the employee from subsidies in an insurance exchange.

Employers who don't qualify for this transition relief face the choices they faced before MV Lite first rode into town: Offer more robust coverage to satisfy the MV standard, or offer only MEC and take their chances that employees will enroll in the MEC plan or at least not seek subsidized coverage in a public insurance exchange, coverage that would trigger a penalty against the employer.

> ***Lockton Comment:*** In highly competitive, lower-margin industries, the early adopters of MV Lite – those employers who qualify for transition relief – may gain a modest, short-term competitive advantage in recruiting or, in the case of the staffing industry, in pricing. These employers can offer coverage that insulates themselves from penalties under the employer mandate's second prong for less cost than some of their competitors.
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> Speaking of staffing firms, some firms have agreed, or are being pushed by their customers to agree, to contractual language under which the staffing firm commits to offering MV coverage to its staffing associates. Staffing firms that have agreed to do so might have to incur greater costs to honor that contractual commitment if they intended to meet it with an MV Lite plan but must instead soon begin to offer more robust MV coverage, in light of today's IRS notice.

Employers that offer an MV Lite plan and who have previously communicated to employees that the plan satisfies the MV standard (and therefore disqualifies the employees from seeking subsidies in a public health insurance exchange) must correct those communications in a timely manner.

These communications are mostly likely to appear in the Marketplace Notice employers are required to supply to new employees, and in the MV Lite plan's "summary of benefits and coverage," or SBC. Employers should move quickly to correct representations that the MV Lite coverage satisfies the MV standard or disqualifies the employee from subsidy eligibility.

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