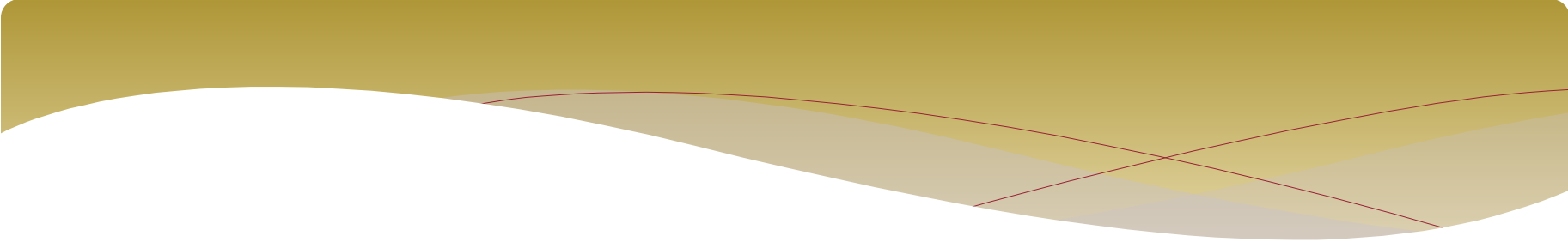


Brown & Brown

Post-Election ACA Round-Up

Mary Bauman



The materials and information have been prepared for informational purposes only. This is not legal advice, nor intended to create or constitute a lawyer-client relationship. Before acting on the basis of any information or material, readers who have specific questions or problems should consult their lawyer.

Marketplace Notice Appeals

Marketplace Notice Appeals

- Recently, many employers have received notices from the Health Insurance Marketplace reporting that in 2016, one or more employees enrolled in coverage on the exchange and received a premium tax credit
- This is not an IRS notice that the employer owes a pay or play penalty

Marketplace Notice Appeals

- What should an employer do?
 - Appeal the notice if the employee was eligible for health coverage and the plan was of minimum value and affordable
- Why?
 - If the employee was eligible for a minimum value, affordable health plan, the employee is not eligible for a premium tax credit and will ultimately be required to repay
 - Correcting the error sooner rather than later minimizes this consequence for the employee

Marketplace Notice Appeals

- While this is not an IRS notice of assessment of a pay or play penalty, if the employee receives the premium tax credit, the marketplace will report this information to the IRS
- This information may lead the IRS to assess an employer pay or play penalty
- Clearing this up now with the marketplace may make the imposition of a pay or play penalty by the IRS with respect to this employee less likely

Marketplace Notice Appeals

- On the other hand, if the employee was not eligible for health coverage or was eligible but waived and the coverage was not affordable, then the employee was eligible for a premium tax credit and the employer should not appeal
 - If the employer should not be subject to a penalty (for example, because the employer didn't offer coverage to an employee who is part-time), the employer should maintain records to demonstrate that the employee was not an ACA full-time employee

Marketplace Notice Appeals

- If the employer appeals, please note the following:
 - Appeal using the prescribed form (see [HealthCare.gov/marketplace-appeals/employer-appeals](https://www.healthcare.gov/marketplace-appeals/employer-appeals))
 - The form is fairly straightforward

Marketplace Notice Appeals

- In Section 3 of the form there is a space for a narrative to explain why the employee should not be eligible for a premium tax credit and you can attach supporting documentation
 - For example, attach a copy of the election form or enrollment form (or screen shot) showing that the employee was offered coverage
 - If employee elected coverage attach copy (or screen shot) of confirmation
 - If employee waived coverage attach copy (or screen shot) of declination

Marketplace Notice Appeals

- Explain that the coverage constituted minimum value coverage (at least as good as a bronze plan on the exchange)
- Minimum value can be demonstrated by:
 - SBC
 - Marketplace notice
 - Actuarial certification
 - Schedule of Benefits
- Explain that the coverage was affordable
 - Marketplace notice
 - Pay stubs

Marketplace Notice Appeals

- Set forth the employee contribution for single coverage under the cheapest medical plan and employer may also want to explain which one of the three affordability safe harbors is being relied on
- Attach a copy of the notice to the form and mail and/or fax it to the address/fax number provided

What's Next?

- IRS may issue a notice of assessment regarding pay or play penalties
 - The notice will not be issued until after the individual files his or her tax return for the year at issue indicating whether the individual received a premium tax credit and the employer files its 1094-C and 1095-C with the IRS
 - The employer will have an opportunity to respond before the IRS assesses penalties

Update on 1094-C and 1095-C Filing

Quicker Deadlines

- For 2016 and later years 1095-Cs must be distributed to employees by the first business day on or after January 31
- The 1094-C and 1095-Cs must be filed with the IRS
 - By the first business day on or after February 28 if filing by mail
 - By the first business day on or after March 31 if filing electronically

No More Good Faith Relief

- \$260 per return penalty for late, incorrect or incomplete forms
- IRS indicated it would not assess penalties in first year for incomplete or incorrect filings if employer made good faith effort
- IRS has not extended good faith relief to 2016 returns

New Forms

- New forms and instructions for 2016 just released
- Forms for 2016 will be different
 - 1094-C
 - Mid-size employers – transition relief/special reporting only available for non-calendar year plans (and until 2016 plan year start)
 - Special qualifying offer relief for 2015 eliminated

New Forms

- 1095-C
 - New instruction to individuals not to attach to tax return
 - Plan start month still optional
 - Line 14 – clarification that must be completed for all 12 months or each month (no blanks)
 - If spouse’s offer of coverage is conditioned on not being eligible for other employer coverage, two new indicator codes for Line 14 (1J and 1K)
 - Spousal eligibility vs. surcharge?
 - If rely on qualifying offer in Line 14 can leave Line 16 blank or complete

Count All Hours in Measuring for Full-Time Status

- IRS Notice 2015-87 clarifies hours crediting rules
- An employee's hours of service:
 - Do not include hours paid solely to comply with state workers' compensation or disability laws
 - Do include hours paid under an employer-provided short or long-term disability plan unless the benefit is solely paid with employee after-tax dollars

Maintain Records to Demonstrate Affordability

- Which affordability safe harbor are you relying on?
 - Box 1 W-2
 - Federal poverty line
 - Rate of pay

Maintain Records to Demonstrate Affordability

- In measuring for affordability, the employee's required contribution cannot exceed 9.5% of one of three affordability safe harbors
- While the 9.5% figure was adjusted annually for inflation when determining an employee's eligibility for a premium tax credit on the exchange, IRS regulations did not extend the inflation adjuster for pay or play purposes

Maintain Records to Demonstrate Affordability

- IRS Notice 2015-87 clarifies that the inflation adjuster is also intended to apply on the affordability/pay or play side
- For plan years beginning in 2015 affordability is measured based on a 9.56% threshold
- Increases to 9.66% for plan years beginning in 2016
- Increases to 9.69% for plan years beginning in 2017

Update on Affordability

- Last December the IRS announced that it would issue regulations to require employers who provide additional compensation to employees who opt out of group health coverage to include that amount when measuring for affordability for pay or play penalty purposes
- In the notice, the IRS also indicated that there may be a special rule where the opt out is conditioned on the employee having other group health coverage

Update on Affordability

- This summer the IRS announced that while it has not yet issued regulations to implement this new rule, the earliest the rule will apply is for plan years beginning on or after January 1, 2017
- In addition, in the new announcement the IRS indicates that opt out arrangements which require employees to provide reasonable evidence that the employee, spouse and dependents have other health coverage will not be included in measuring affordability

Update on Affordability

- “Reasonable evidence” includes attestation or certification (actual proof not required)
- Other health coverage cannot include individual coverage (private market or exchange)
- Attestation or certification should include entire period for which coverage is being waived

Changes for 2017

Changes for 2017

- Medical FSA annual employee contribution limit increasing from \$2,550 to \$2,600
- HSA annual contribution limits
 - Single coverage – increasing from \$3,350 to \$3,400
 - Family coverage unchanged at \$6,750
 - Age 55 catch-up unchanged at \$1,000

Changes for 2017

- Maximum out-of-pocket limits
 - All plans – increasing from \$6,850 (single)/\$13,700 (family) to \$7,150 (single)/\$14,300 (family)
 - HDHPs with HSAs – unchanged at \$6,550 (single)/\$13,100 (family)

Changes for 2017

- Adjuster for determining affordability
 - Increasing from 9.66% to 9.69% for plan years beginning in 2017
 - Example: For calendar year plan, the federal poverty line safe harbor for 2017 will be $\$11,880 \times 9.69\% = \$1,151.17 \div 12 = \$95.93$ per month

Changes for 2017

- Transition reinsurance fee
 - Decreasing from \$27 per participant to \$0 (sunsets after 2016)
- PCORI fee
 - Increasing from \$2.17 per life for plan years ending on or after October 1, 2105 and before October 1, 2016
 - To \$2.26 per life for plan years ending on or after October 1, 2016 and before October 1, 2017
 - Sunsets for plan years beginning on or after October 1, 2019

Possible Legislative Proposals

Possible Legislative Proposals

- Now that the election is over, those watching Congress and the White House have already begun speculating on whether there will be any changes to the Affordable Care Act
- Repeal and replace?
 - Need filibuster-proof Senate majority of 60 to repeal
 - Only need simple majority of 51 in Senate to make changes through budget reconciliation

Possible Legislative Proposals

- Trump proposals
 - Eliminating individual mandate penalty
 - Allowing health insurance to be purchased across state lines
 - Providing full tax deduction for purchase of individual insurance policies
 - Making HSAs more attractive
 - Promoting more price transparency from health care providers
 - Making block grants to states for Medicaid

Possible Legislative Proposals

- Permitting patients to purchase drugs from foreign countries
- Other proposals?
 - Repealing the employer mandate (pay or play penalty) or potentially simplifying reporting and/or modifying the definition of full-time employee to 40 hours per week
 - Modifying or eliminating the Cadillac Tax
 - Broadening the rules for HRAs and HSAs

Possible Legislative Proposals

- The Trump administration is also likely to weaken Health Care Reform through not enforcing regulations, discontinuing regulation projects in the pipeline and not defending court cases challenging Health Care Reform



Mary V. Bauman

616.831.1704

baumanm@millerjohnson.com

Arena Place
45 Ottawa Avenue SW
Suite 1100
Grand Rapids, MI 49503
millerjohnson.com

Radisson Plaza Building
100 West Michigan Avenue
Suite 200
Kalamazoo, MI 49007
millerjohnson.com

