

Employer Responsibility Provisions

December 7, 2011

American Benefits Council
Preparing for PPACA

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Overview

- » Two important pieces of early guidance
 - Notice of Proposed Rulemaking (“NPRM”) (August 17, 2011)
 - Principally pertains to IRC section 36B Premium Tax Credit
 - Notice 2011-73 (September 13, 2011)
 - Principally pertains to employer shared responsibilities, i.e., penalties, under IRC section 4980H

NPRM – IRC § 36B Premium Tax Credit

- » Issued August 17, 2011
- » Proposed regulations regarding the premium tax credit under IRC section 36B
- » Addresses:
 - Who is eligible for the tax credit and when
 - How to compute the credit, when to compute the credit, and any necessary reconciliation

** The preamble to the NPRM includes a host of very interesting statements that reach beyond IRC section 36B to other important provisions, such as “minimum essential coverage”, “minimum value” and the contemplated Form W-2 employer safe harbor for purposes of the IRC section 4980H penalties

NPRM – IRC § 36B Premium Tax Credit

- » Why should you care?
 - Penalty under IRC section 4980H(b) is based on whether a full-time employee is eligible for a tax credit under IRC section 36B
- » Who is eligible for the IRC section 36B premium tax credit?
 - Qualifying individuals without access to affordable minimum essential coverage (other than through the individual market) that provides minimum value

NPRM – IRC § 36B Premium Tax Credit

» Who is a qualifying individual?

- “Household income” must be equal to or between 100 and 400% of federal poverty level)

Note: “Household income is defined to essentially be “modified gross income”. Issue of economic equivalence.

- If married, must file joint federal tax return
- Can’t be a dependent of another taxpayer
- Additional rules apply for incarcerated individuals and resident aliens

NPRM – IRC § 36B Premium Tax Credit

» What qualifies as “minimum essential coverage”?

– Defined in IRC section 5000A(f)

- Definition references insured group health plans and grandfathered plans but does not expressly reference self-insured, non-grandfathered group health plans

** NPRM indicates that future guidance is expected clarifying that self-insured, non-grandfathered employer-sponsored group coverage will qualify as minimum essential coverage

** NPRM also states that future guidance is expected confirming that self-insured plans are not required to provide each of the 10 categories of benefits that comprise essential benefits... Good news, BUT WAIT... what about minimum value?

– NPRM also states:

- If an employee is eligible during open enrollment, then he or she will be deemed eligible for the duration of the plan year
- Continuation coverage will also qualify as minimum essential coverage if the individual enrolls in such coverage

NPRM – IRC § 36B Premium Tax Credit

- » When is minimum essential coverage deemed affordable?
 - The employee’s required contribution does not exceed 9.5% of “household income”
 - Required contribution equals employee’s premium share only
 - Per NPRM, affordability is based on self-only coverage versus family coverage
 - Use employer’s lowest-cost plan that provides minimum value
 - If self-only coverage is affordable for employee, then spouse and dependents are deemed ineligible for premium tax credit (but may be excepted from individual mandate)

Note: Questions remain regarding application of new PHSA section 2707 (which imposes certain cost-sharing limitations) to large group and self-insured plans. This has implications for ability of employers to keep coverage “affordable”

NPRM – IRC § 36B Premium Tax Credit

» What is “minimum value”?

- IRC section 36B provides that a plan has minimum value if its share of the total allowed costs of benefits is at least 60% of the costs
 - NPRM reinforces this interpretation.... BUT....
 - NPRM also includes language in the preamble suggesting regulators are considering imposing some “floor” of federally mandated benefits for purposes of determining minimum value

Notice 2011-73 – Employer Safe Harbor Under IRC § 4980H(b)

- » Issued on September 13, 2011
- » Requests comments on proposed safe harbor for employers for determining whether full-time employee's coverage is affordable for purposes of 4980H(b)
 - Comments are due by December 13, 2011

Note: Employee's actual eligibility for the premium tax credit under IRC section 36B continues to be based on applicable household income

Notice 2011-73 – Employer Safe Harbor Under IRC § 4980H(b)

» Specifics of Safe Harbor

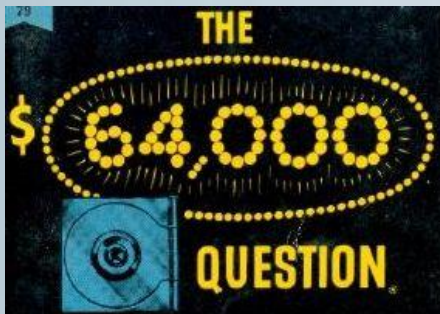
- Affordability based only on employee's Box 1, Form W-2 wages, i.e., taxable wages
 - Issue of elective deferrals and economic equivalence
 - Determined at the end of the year
 - What happens if wages unexpectedly decrease?
 - What about hourly employees?
 - Determined on employee-by-employee basis

Note: Even if employee ends up being eligible for an IRC section 36B premium tax credit based on applicable household income, employer would not be subject to IRC section 4980H(b) penalty under contemplated safe harbor

Notice 2011-73 – Employer Safe Harbor Under IRC § 4980H(b)

» Safe Harbor

- Must provide minimum essential coverage with minimum value to not only a full-time employee but also his spouse and dependents
 - What is the default rule?
 - Statutory language says employer must provide coverage to its “full-time employees (and their dependents)”
 - At least one regulator has express his personal views that the default rule should require that minimum essential coverage be made available to a full-time employee AND his or her spouse and dependents



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