

BRUCKER



MORRA

A Professional Corporation

On Benefits

Exclusively practicing employee benefits law ♦ ERISA ♦ and benefits taxation

Application of Non-Discrimination Rules Delayed for Insured Group Health Plans Under PPACA

Jeremy M. Pelphrey
December 22, 2010

The U.S. Department of the Treasury today provided notice addressing the timing of the application of the PPACA provisions prohibiting insured group health plans from discriminating in favor of highly compensated individuals. *Notice 2011-1.*

The Notice follows Notice 2010-63 issued September 20, 2010 that requested comments on the extension of the non-discrimination provisions under Section 105(h) of the Internal Revenue Code to insured group health plans. The comments received raised fundamental concerns about a plan sponsor's ability to comply with the non-discrimination provisions and as such, the U.S. Department of the Treasury is delaying compliance with the PPACA provisions prohibiting discrimination in insured group health plans until further guidance is issued.

Background. The Patient Protection and Affordable Care Act, and the subsequent Reconciliation Act (collectively, "PPACA") provides that a group health plan (other than a self-insured plan) must satisfy the requirements of Section 105(h) of the Code and that rules similar to the non-discriminatory eligibility classification, non-discriminatory benefits, and controlled group rules of such Section shall apply. Furthermore, PPACA provides that the term "highly compensated individual" has the meaning proscribed in

Section 105(h) of the Code. An insured group health plan that fails to comply with these rules may be subject to: (i) an excise tax of \$100 for each day in the non-compliance period with respect to each individual to whom such failure relates; (ii) in the case of a non-Federal governmental group health plan, civil money penalties of up to \$100 per day per individual; or (iii) a civil action.

Comment. Prior to PPACA, Section 105(h) of the Code generally applied to self-insured group health plans. If a self-insured plan failed to comply with Section 105(h), highly compensated individuals lost their tax benefit. PPACA extends the application of Section 105(h) of the Code to insured group health plans and if they fail to comply with Section 105(h), the plan or plan sponsor may be subject to an excise tax, civil money penalties, or a civil action to compel it to provide non-discriminatory benefits.

Comment. The PPACA provision does not apply to grandfathered health plans which has been a significant benefit to maintaining grandfathered health plan status.

Subsequent to PPACA, the U.S. Department of the Treasury issued Notice 2010-63 requesting comments on guidance necessary in the application of the non-discrimination provisions to insured group health plans. The comments that

Attorneys

- Alex M. Brucker
- Linda Russano Morra
- Meredith J. Sesser
- Cathryn B. Sportsman
- Jeremy M. Pelphrey

T: (310) 475-7540

F: (310) 470-4806

W: www.pensionlawyers.com

were received raised fundamental concerns about a plan sponsor's ability to comply with the provisions without additional regulatory guidance. Specifically, many comments requested guidance regarding the meaning of "rules *similar to*" the non-discriminatory eligibility classification, non-discriminatory benefits, and controlled group rules. The reference means that guidance must specify in what respects insured group health plans are subject to the same statutory provisions that otherwise apply to self-insured plans.

Notice Application. In noting that regulatory guidance is essential to the operation of the PPACA provisions, the U.S. Department of the Treasury, as well as the Departments of Labor and Health and Human Services, determined that compliance with the non-discrimination provisions should not be required (and thus, any sanctions for failure to comply do not apply) until after regulations or other administrative guidance has been issued.

Comment. The guidance, once issued, will not apply until plan years beginning a specified period after issuance. Thus, plans and plan sponsors will not be caught off-guard with eventual compliance. Also, before the beginning of those plan years, an insured group health plan sponsor will not be required to file new IRS Form 8928 with respect to excise taxes resulting from non-discrimination.

The U.S. Department of the Treasury, as well as the Departments of Labor and Health and Human Services have, by way of the Notice, requested additional comments on the issues that should be addressed in the regulatory guidance. Specifically, the Departments are looking for comments on the following:

- The basis on which the determination of what constitutes non-discriminatory

benefits should be made and what is included in the term "benefits"

- An alternative method of compliance that may involve only a coverage test
- The application of Section 105(h) to insured group health plans following the introduction of the exchanges in 2014
- Whether the highly compensated employee definition of Section 414(q) of the Code is a more appropriate definition
- Whether the application of the standards on a geographic basis should be permissive or mandatory
- Whether guidance should provide for "safe harbor" plan designs
- Whether plan sponsors should be permitted to aggregate different coverage options
- The application to expatriate and in-patriate coverage
- The application to multiple employer plans
- The application of coverage on an after-tax basis to highly compensated individuals
- The treatment of employees who voluntarily waive coverage
- The application of sanctions for non-compliance.

Comment. The comments previously submitted exposed substantial areas of concern for insured group health plan sponsors. Having considered the concerns, the Departments have taken a reasonable approach in addressing the issues insured group health plan sponsors will have in complying with the non-discrimination provisions of PPACA. Insured group health plan sponsors should expect guidance next year.

DISCLAIMER

The information contained herein is provided by Brucker & Morra, APC as general information to clients and friends. It should not be construed as, and does not constitute, legal advice on any specific matter, nor does this message create an attorney-client relationship. These materials may be considered ATTORNEY ADVERTISING in some states.