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Final Regulations to Fix the ACA's Affordability "Family Glitch"

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On October 11, 2022, the Treasury Department and Internal Revenue Service ("IRS") finalized regulations that expand the availability of Marketplace premium tax credits for employees' family members. The final rule generally follows the proposed rule issued in April 2022. To qualify for a premium tax credit, the final rule provides that:

- Affordability of employer-sponsored coverage for family members would be determined based on the employee's cost to cover the employee and the family members.
- The determination of whether employer-sponsored coverage for family members provides minimum value would also be based on the coverage available to family members.

The rule takes effect for plan years beginning on and after January 1, 2023.

These regulations do not affect the affordability determination for purposes of the Affordable Care Act's ("ACA") employer mandate; however, they may indirectly impact employer plans as more family members may qualify for premium tax credits and choose to enroll in coverage through the Marketplace.

Simultaneously, the IRS released Notice 2022-41, creating a new permitted election change under the Section 125 cafeteria plan rules. The Notice permits, but does not require, an employer with a non-calendar year plan to allow an employee to prospectively revoke a pre-tax election for family coverage under a group health plan to enable one or more family members to enroll in Marketplace coverage.

Additional details follow.

Background

Currently, individuals are not eligible for Marketplace premium tax credits if they are offered employer-sponsored group health plan coverage that is "affordable" and provides "minimum value."

For this purpose, employer-sponsored coverage is deemed "affordable" if an employee is required to pay no more than 9.5% (indexed each year – 9.61% for 2022 and 9.12% for 2023) of household income for self-only coverage. Coverage is considered affordable for both the employee and the employee's family members, regardless of how much the employee must pay to cover those family members under the employer's group health plan. This is known as the "family glitch."

An employer-sponsored plan provides "minimum value" if the plan's share of the total allowed cost of benefits provided is at least 60% and includes substantial coverage of inpatient hospital services as well as physician services. Under current rules, when self-only coverage offered by an employer provides minimum value to an employee, the coverage offered to the employee's family is also considered to provide minimum value.

Affordability

Consistent with the proposed changes, the final rule refines the definition of affordable coverage to make it easier for family members to qualify for premium tax credits. Employer-sponsored coverage would be considered affordable for family members (thereby disqualifying them from eligibility for premium tax credits) only if the portion of the annual premium the employee must pay for the family coverage does not exceed 9.5% of household income (as indexed).

As a result, when assessing whether an individual has received an affordable offer of employer-sponsored coverage, the Marketplace would look separately at the employee's cost of self-only coverage (to determine the employee's own eligibility for premium tax credits) and at the employee's cost to cover the family (to determine the family members' eligibility for premium tax credits). There will likely be scenarios wherein an employee has an offer of self-only coverage that is affordable, but the offer of coverage to the family members is considered unaffordable (thus potentially qualifying those family members for new premium tax credits).

For this purpose, family coverage means all employer plans that cover any related individual other than the employee, including a self-plus-one plan for an employee enrolling one other family member in the coverage. The final rule provides various examples that may arise to determine whether employer coverage is affordable, including situations where an individual has offers of coverage from multiple employers or where covered family members are not part of the employee's tax family (e.g., a non-tax dependent child or a spouse filing separately).

The final rule does not affect the affordability test for employees. Employees remain ineligible for premium tax credits in the Marketplace if offered affordable self-only coverage from their employer.

Minimum Value

The final rule also amends the premium tax credit eligibility rules related to minimum value. An employer-sponsored plan would be considered to provide minimum value for family members if the plan's share of the total allowed costs of benefits provided to family members is at least 60%. Note that it would be unusual to have a plan design where an employer offers minimum value coverage to an employee but not the family members.

The final rule also confirms that, to provide coverage of minimum value, the plan must include substantial coverage of inpatient hospital services as well as physician services.

The final rule does not affect the minimum value test for employees.

Implementation

The Department of Health & Human Services ("HHS") will revise the Marketplace application process to include new questions about offers of employer coverage to family members and will work with the individual state marketplaces to ensure that the entities take necessary steps to educate the public. The IRS also expects to update forms and publications ahead of the 2023 Marketplace annual enrollment season.

Although a model notice was requested during the comment period, the final rule imposes no new notice requirements on employers. The preamble also confirms that the IRS does not intend to update Forms 1095 to require additional data elements.

Corresponding Cafeteria Plan Changes – IRS Notice 2022-41

Under existing Section 125 cafeteria plan rules, an employee may not revoke a pre-tax salary reduction election associated with family group health plan coverage during the plan year and elect self-only coverage (or another form of family coverage, such as employee plus one) solely to allow one or more family members the ability to enroll in the Marketplace. This restriction applies even if the family member is newly eligible to enroll due to a special enrollment opportunity or during the Marketplace annual open enrollment. This tends to be an issue for non-calendar year plans.

To address this situation, the IRS issued Notice 2022-41 which permits (but does not require) an employer with a non-calendar year plan to adopt an amendment to the cafeteria plan to allow an employee to prospectively revoke a pre-tax election for family coverage under a group health plan when:

- one or more related individuals are eligible for a special enrollment period to enroll in Marketplace coverage or one or more already-covered related individuals seeks to enroll in the coverage during the Marketplace's annual open enrollment period; and
- the revocation of the election of coverage under the group health plan corresponds to the intended enrollment of the related individual(s) in the Marketplace for new coverage that is effective beginning no later than the day

immediately following the last day of the original coverage that is revoked. If the employee does not enroll in Marketplace coverage, the employee must elect self-only coverage (or family coverage including one or more already-covered related individuals) under the group health plan.

A cafeteria plan may rely on the reasonable representation that the employee and/or related individuals have enrolled or intend to enroll in the Marketplace for new coverage that is effective beginning no later than the day immediately following the last day of the original coverage that is revoked.

To allow for this change, the cafeteria plan must be amended on or before the last day of the plan year in which the election is allowed and the amendment may be effective retroactively to the first day of the plan year provided the cafeteria plan operates in accordance with the Notice, and the employer informs participants of the amendment.

For a plan year that begins in 2023, an employer may amend a cafeteria plan to adopt the new permitted election change at any time on or before the last day of the plan year that begins in 2024.

In no event may an employer amend a cafeteria plan to allow an election to revoke coverage on a retroactive basis. In addition, the health FSA election may not be changed under this provision.

Employer Action

The final rule does not impact the determination of whether employer-sponsored coverage is affordable for purposes of avoiding a shared responsibility penalty under the ACA's employer mandate. Whether the coverage is affordable for this purpose continues to be based solely on the cost of self-only coverage in the lowest-cost minimum value plan.

The rule confirms that there will be no changes or additional information required on the ACA forms 1095-B and 1095-C as a result of the changes made under the final rule.

However, employers may see employees more closely evaluate options for family members in the Marketplace during this open enrollment season. Employees may find Marketplace coverage more cost effective than the employer plan and remove their family members from the group health plan.

What to do?

- Employers may consider outreach and communication to employees and their families to educate them on the premium tax credits that may newly be available on the Marketplace.
- Employers with non-calendar year plans should consider whether to adopt this discretionary cafeteria plan provision allowing employees the opportunity to revoke prospective elections in response to the premium tax credits available on the Marketplace. Employers adopting this change should update their plan documents accordingly and communicate the change with participants.