



CLIENT ACTION Bulletin

Employee Benefits

A Roundup of Recent Regulatory Guidance on Health Reform

SUMMARY Federal agencies have issued several pieces of guidance for employee health benefit plan sponsors moving forward on implementing changes required under the health reform law (“PPACA”). The agencies also released guidance for other entities (insurance companies, primarily) that will be involved in health insurance offerings to individuals and small employers when the new exchanges become operational beginning in 2014.

DISCUSSION **PCORI Funding**

The IRS on Dec. 6 issued a final rule on the excise tax that certain health insurers and group health plan sponsors (including those that are self-insured) will pay to help fund the Patient-Centered Outcomes Research Institute (PCORI). PPACA established the PCORI to evaluate and compare the clinical effectiveness of various medical treatments, services, procedures, and drugs. The law sets the tax based on the average number of lives covered in plan or policy years beginning Sept. 30, 2012, and ending Sept. 30, 2019. Under the final rule, the fee is set at \$1.00 times the average number of covered lives for plan years ending before Oct. 31, 2013, and increases to \$2.00 for the second plan or policy year. In the remaining years, the tax will be adjusted “based on increases in the projected per capita amount of National Health Expenditures.” The final rule also provides guidance on:

- who pays the fee (e.g., the insurer or the plan sponsor but *not* a third-party administrator);
- how and when payments are reported and made (i.e., generally, by July 31 of the year following the last day of the policy/plan year);
- which types of plans are subject to the fee (e.g., retiree-only plans and plans providing COBRA coverage, but not employee assistance programs or “excepted” or stand-alone plans); and
- how to calculate the average number of covered lives (i.e., three methods, including using the IRS Form 5500 counts).

In addition, the rule provides: special rules for employers that sponsor both fully insured and self-insured plans; additional methods for self-insured plans to count covered lives; guidance on counting for the first and last plan/policy years; and specific guidance for nonexcepted health reimbursement arrangements (HRAs) and health flexible spending accounts (FSAs). Finally, the Department of Labor (DOL) has advised that paying the PCORI fee generally does not constitute a permissible plan expense under ERISA Title I.

Medicare Part A Payroll Tax Increase

The IRS on Dec. 5 published a proposed rule and “Frequently Asked Questions” on the 0.90% additional Medicare Part A payroll tax to be paid by higher-income employees (but not employers) beginning Jan. 1, 2013. PPACA increased the tax rate from 1.45% to 2.35% on earnings (including noncash fringe benefits) over \$200,000 for an individual employee and \$250,000 for married couples filing jointly.

Under the proposed rule, an employer collects the tax from employees via payroll withholding (as it does for Federal Insurance Contributions Act (FICA) taxes). The additional tax is assessed once an employee’s FICA wages reach the threshold amount. If the employer does not withhold the additional tax, the employee is obligated to pay the tax when reconciling his or her individual income tax return. The proposed rule also specifies the requirements for withholding, computing, reporting, and paying the additional Medicare tax, and provides guidance on when and how employers may make an interest-free adjustment to correct an overpayment or underpayment of the additional tax, as well as on how employers and employees may claim refunds for overpayments.

Guidance on Transitional Reinsurance Fees and Wellness Programs

The federal agencies issued proposed rules on PPACA's transitional reinsurance fees and wellness programs, but plan sponsors may not rely upon the proposals at this time. The agencies are expected to release final rules before the 2014 effective date.

- The Department of Health and Human Services (DHHS) published a Dec. 7 proposed rule that, in part, addresses the fees under PPACA's "transitional reinsurance" program that is aimed at stabilizing premiums in the individual insurance market during the first three years the exchanges operate. The fees will generally be assessed on health insurers and employers offering self-insured plans during 2014, 2015, and 2016 and distributed to plans in the exchanges with a disproportionate number of high-cost enrollees. The proposed rule explains how the DHHS will calculate the fees, estimated at \$63 annually per covered life. It also specifies: the entity responsible for, and the frequency of, contributions; the types of plans and coverage to be assessed; the different methods for determining the number of covered lives; and the applicable rules if an individual is enrolled in an employer-sponsored group health plan and has coverage under Medicare. *Separately*, the IRS's "Frequently Asked Questions" on the tax treatment of the fees states that the DOL has advised that paying the required contributions would constitute a permissible plan expense under ERISA Title I.
- The IRS, the DOL, and the DHHS published a Nov. 26 proposed rule on PPACA's provision allowing group health plans to provide larger incentives than currently permitted for participants in nondiscriminatory wellness programs. In general, the proposed rule addresses the permitted rewards – 30% of the cost of healthcare coverage, in general, up from 20% currently – for participants in wellness programs (including insured or self-insured grandfathered plans). The incentive may be as much as 50% for participating in tobacco cessation or use-prevention programs. The proposed rule: describes eligible wellness programs; provides standards for determining if a program offers a "reasonable alternative" or a waiver for participants to satisfy any criteria for rewards that are based on the results of medical tests or screening; and includes model language to notify individuals about alternative means to qualify for the incentives. The proposed rule does not address key issues raised under the Genetic Information Nondiscrimination Act (GINA) or the Americans with Disabilities Act (ADA), statutes with which the Equal Employment Opportunity Commission (EEOC) shares oversight authority. Until a final rule is published, regulations issued in 2006 remain in effect.

Other PPACA-Related Regulations

The federal agencies released other proposed rules, some of which will have only indirect implications for large, employer-sponsored group health plans, because the rules focus on the requirements for the new exchanges and thus are aimed primarily at insurers or other entities. The proposed rules might be of some interest to small employers participating in the exchanges beginning in 2014. In all cases, the rules may not be relied upon until they are published in final form. The various proposed rules address: "essential health benefits," "actuarial value" determinations in the individual and small group markets, and "minimum value" standards for the large group market; insurance market reform provisions, including "guaranteed issue" and "community rating" requirements, and premium "rate band" limits; the "multistate insurance plan" program requirements; and the additional 3.8% tax on individuals with net investment incomes exceeding \$200,000, beginning in 2013.

ACTION

Sponsors of group health plans should review and take steps to ensure compliance with the PCORI excise tax requirements, and all employers should determine the actions needed for their payroll administration systems to accommodate the additional Medicare Part A tax withholding on affected employees' wages. Employers also should examine the other proposed rules under PPACA for their possible or likely effects on their group health plans or insurance, and consider submitting formal comments quickly, because the federal agencies granted only 30-day comment periods on most of the proposed rules. Finally, employers should account for the increased fees in their 2014 budgets.

For additional information about any of the regulations discussed or for assistance with determining the specific implications for your group health plans, please contact your Milliman consultant.