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Health Care Reform
Nondiscrimination Fact Sheet

September 23, 2010

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Background:

Under the Patient Protection and Affordable Care Act (PPACA or health care reform law), fully insured group health plans may not have rules/criteria for member eligibility or benefits that have the effect of discriminating in favor of highly compensated employees. This provision goes into effect for plan years beginning on and after September 23, 2010. Recently, the IRS and U.S. Department of Health and Human Services provided additional guidance about this provision. Here's what you need to know.

To whom the provision applies

The nondiscrimination provision of the health care reform law applies to fully insured plans only. Self-insured plans are already subject to similar nondiscrimination requirements based on a law enacted in 1978. The nondiscrimination rules do not apply to fully insured grandfathered health plans.

What the provision requires

The legislation establishes eligibility and benefits "tests" to determine if a plan complies. These tests are based on the rules applicable to self-insured groups:

- Eligibility test – A plan meets the eligibility test if it satisfies one of two thresholds for numbers of employees who benefit or if it benefits a nondiscriminatory class of employees.
- Benefits test – A plan meets the benefits test if all benefits provided for participants who are highly compensated individuals are provided for all other participants.

Penalties could be assessed if a plan is found not to comply, including a $100 per person per day penalty for each violation.

Which plans this provision primarily affects

While interim final regulations for this provision are not yet available the provision appears to have the greatest impact on:

- Executive medical plans that supplement an employer's regular medical plan
- Class plans that limit enrollment in plan offerings to a subset of employees or offer reduced benefits to a subset of employees

Some organizations offer higher benefit levels for a higher cost and/or for highly compensated employees who are required to pay more for their benefits. These types of offerings could comply, but groups would need to have the benefit design tested to ensure compliance with the legislation.

NOTE: We do not develop plans only for a specific set of employees. Additionally, we do not track or record the compensation information of employees in health plans to determine if a plan is only being offered to highly compensated individuals. Therefore, we are relying on the employer or group to ensure compliance with this requirement of the health care reform law.

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Questions and Answers:

Whose responsibility is it to ensure compliance with the nondiscrimination provision?
The group is responsible for complying.

Does your company know if a plan is only offered to a subset of employees?
Not in enough detail to be able to determine compliance with the nondiscrimination rule. Although we usually know the group's general eligibility criteria, we do not consider or store member compensation information for creating plan offerings. Therefore, the group is responsible for complying.

Can an employer use a formula rooted in hours worked, not compensation, to determine employee eligibility for benefits?
If the plan is grandfathered, the group can continue to use this formula until it makes a change that would cause a loss of grandfathered status. For a group plan that is not grandfathered, although this arrangement does not appear to specifically favor highly compensated employees, we would recommend the group work with its legal and benefits counselors as we cannot provide legal or tax advice.

Can an employer have different waiting periods or different premium contribution rules for different classes of employees?
If the plan is grandfathered, the group can continue to have different waiting periods or different premium contribution rules for different classes of employees until the group makes a change that would cause a loss of grandfathered status. For a group plan that's not grandfathered, it remains unclear whether these arrangements will be permitted for plan years beginning on and after September 23, 2010. We recommend that groups with these arrangements work with their own legal and benefits counselors as we cannot provide legal or tax advice.

How does the law define "highly compensated individual"?
The health care reform law cross-references section 105(h) of the Internal Revenue Code, which sets the definitions and rules for nondiscrimination in favor of highly compensated individuals as they apply to self-insured groups. Section 105(h) defines a highly compensated individual as one of the five highest paid officers, a shareholder who owns more than 10% in value of the stock of the employer or among the highest paid 25% of all employees.

Will you continue to offer executive medical plans?
If a customer is renewing and maintaining grandfathered status, keeping the executive medical plan is still an option. The nondiscrimination provisions of the health care reform law apply only to plans that are not grandfathered. As we receive more details about the nondiscrimination provisions and other health care reform requirements, we will reassess whether to continue offering executive medical plans.

Will you modify grandfathered executive medical plans?
Not because of the nondiscrimination provision of health care reform law. However, because of the provision related to dollar limits on essential health benefits, existing executive medical plans must be modified so that:

- They include coverage for only nonessential health benefits or
- They include coverage for essential and nonessential health benefits, but any annual or lifetime dollar maximums are removed for essential health benefits