LEGAL UPDATES

PUBLISHED: DECEMBER 23, 2010

Delayed Application of 105(h) Nondiscrimination Rules to Fully Insured, Non-Grandfathered Plans

Service

Employee Benefits & Executive Compensation

Based on the principle of better late than never, the Department of Treasury and the IRS issued Notice 2011-1 on December 22, 2010 to delay application of the nondiscrimination rules contained in Section 105(h) of the Internal Revenue Code (Section 105(h)) to insured group health plans until future guidance is issued. The section currently applies only to self-funded group health plans.

The Patient Protection and Affordable Care Act and the Health Care and Education Reconciliation Act of 2010 (together referred to as the Act) were enacted as comprehensive healthcare reform in March 2010. The Act extends the application of Section 105(h) to fully insured, non-grandfathered group health plans with plan years beginning on and after September 23, 2010 (i.e., January 1, 2011 for calendar year plans). However, the Act contemplates that certain rules and definitions "similar to" those found in Section 105(h) will also apply.

Notice 2011-1 acknowledges the challenge of complying with the Act's reference to "similar" rules absent further definition and guidance. Therefore, insured group health plans are not required to comply with Section 105(h) until plan years that begin on dates to be determined following the release of such guidance. For calendar year plans, this means that compliance will not be required before 2012 at the earliest.

Under the Act, violations of the Section 105(h) nondiscrimination rules will result in sanctions for a fully insured plan, including an excise tax of as much as $100 for each day of noncompliance for each individual to whom the violation relates, and a suit to enjoin the prohibited discrimination. In contrast, noncompliance with Section 105(h) by a self-funded group health

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plan results in loss of tax benefits to highly compensated individuals, but no excise tax penalty.

Notice 2011-1 requests public comments regarding thirteen specific issues that may be addressed in future guidance concerning the nondiscrimination rules for fully insured group health plans.

What This Means to You

Many employers have already made decisions based on the statutory effective date of the nondiscrimination rules applicable to insured health plans. However, to the extent those decisions are still pending or can be unwound, Notice 2011-1 is welcome relief. Employers that would like to submit comments may do so before the March 11, 2011 deadline.

Contact Info

Please contact a member of the Employee Benefits and Executive Compensation practice group if you have questions or if we can assist in any way.

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