



ACA Compliance Alert: “Opt-Out Payments” to Employees Who Decline Employer Health Coverage

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The IRS released proposed regulations in July to clarify how payments an employee could elect under an opt-out provision in an employer’s group health plan must be taken into account in determining whether the cost of coverage is affordable under the Affordable Care Act (ACA) rules. Whether an employer provides affordable coverage to its employees affects whether the employer can be assessed a penalty under ACA’s employer mandate and whether an individual is exempt from the individual mandate penalty. How “affordable coverage” is calculated is a crucial question under the ACA. The Presidential election may result in repeal or substantial modification of the ACA. Since we don’t know how fast that will occur, employers may still want to be sure opt-out arrangements are structured to avoid ACA penalties.

The newly proposed regulations explain when payments available under an “opt-out arrangement” are treated as a cost to employees in determining if health coverage is affordable. An “opt-out arrangement” is an arrangement where the employer pays cash to employees who decline coverage under the employer’s group health plan.

In Notice 2015-87, the IRS took the position that the availability of opt-out payments is treated as a cost to the employee, in addition to the premium the employee must pay, in determining the total cost of coverage to the employee and whether that cost is affordable calculation. Because the affordable cost level is low, counting the opt-out payments often causes the premiums to exceed the affordability limit. However, the IRS also suggested that “conditional” opt-out arrangements are not counted, and said that further guidance would be forthcoming. The proposed regulations contain the promised guidance.

Under the proposed regulations, the availability of a payment to employees under an “eligible opt-out arrangement” will not be

counted in the affordability calculation for that employer's health coverage. An eligible opt-out arrangement requires the employee who declines employer-provided health coverage to provide evidence that the employee and his or her dependents have other group coverage.

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