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Should Plan Years be Changed to Delay Compliance with ACA Provisions?

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Representatives from several insurance carriers are encouraging employers with 51-100 full-time employees to move their policy years to December 1 – November 30, effective December 1, 2015, to delay certain design requirements applicable to non-grandfathered group health plans for plan years beginning on or after January 1, 2016. These design requirements are:

- Small, insured group health plans must offer essential benefits and provide a bronze level of coverage.
- Insurance carriers will be subject to new underwriting rules with respect to small, insured groups. Instead of using experience rating, carriers will use community rating. Rating variations will be restricted to (a) benefit coverage elected (plan and tier), (b) geographic area, (c) age, limited to a ratio of 3 to 1 for adults, and (d) tobacco use, limited to a ratio of 1.5 to 1.

The definition of “small employer” will increase from an employer with up to 50 employees to an employer with up to 100 employees, beginning with the 2016 plan year. However, it is possible that this could be delayed.

There are compliance issues associated with changing a plan year – importantly:

- Changing the plan year to later in the calendar year will expose a mid-sized employer to the employer penalty as of January 1, 2015 rather than the first day of the 2016 plan year.
- Changing plan years to delay the effective date of certain ACA-related mandates is arguably impermissible.

Below is a summary of these compliance issues. It is important that employers considering changing their policy years consult counsel.

Plan Year vs. Policy Year

First, changing a policy year is not relevant for health care reform purposes. The plan year is relevant. A plan year is an accounting period. It is usually the same as the policy year (the period for which rates are locked in), but not always. To confirm the plan year, employers can examine the summary plan description and/or Form 5500.

In addition to any policy year change, there should be a plan year change. Additionally, if employees pay premiums on a pre-tax basis, there should be a plan year change for the cafeteria plan. Any plan year change would have to be properly documented. It may be desirable to change other policy years and plan years (e.g., for the disability and life insurance plans) as well to maintain a consistent program.

2015 Transition Relief for Employers with 50-99 Full-Time Employees

Beginning in 2015, large employers can be subject to a penalty when not offering affordable, minimum value coverage to all full-time employees. The final rules provide relief for mid-sized employers to delay the employer penalty until 2016.

The transition relief applies to all calendar months of 2015 plus any calendar months of 2016 that fall within the employer's 2015 plan year; it will cover non calendar-year plans, but only if the employer satisfies certain criteria – one of which is that the employer did not modify the plan year after February 9, 2014 to begin on a later calendar date (for example, changing the start date of the plan year from January 1 to December 1).

Thus, if a mid-sized employer changes its plan year to later in the calendar year, it will no longer be eligible for the transition relief and may be subject to the employer penalty as of January 1, 2015.

Changing the Plan Year to Avoid Federal Law

Although there does not appear to be any specific prohibition at this time, changing a plan year for the purpose of avoiding Federal law has been prohibited historically in various benefits contexts, including one provision applicable to health care reform. Examples include the following:

- Under guidance issued under health care reform, for a health FSA, a short plan year may only be used for a valid business purpose which does not include delaying application of the $2,500 limit. If a change in the plan year does not satisfy this valid business purpose requirement, the plan year for the cafeteria plan remains the plan year that was in effect prior to the attempted change. IRS Notice 2012-40.

- A cafeteria plan can have a short plan year for a valid business purpose. A plan year may not be changed if a principal purpose of the change is to circumvent the requirements of Code § 125 or the regulations thereunder. IRS Prop Reg. § 1.125-1(d)(2).

- For merger and acquisition purposes, changing a plan year must be done for a valid business purpose. Where a transaction has no substantial business purpose other than the avoidance or reduction of Federal tax, the tax law will not regard the transaction. See Gregory v. Helvering, 293 U.S. 465 (1935).

- For COBRA purposes, if a principal purpose of establishing separate plans is to evade any requirement of law, then the separate plans will be considered a single plan to the extent necessary to prevent the evasion. IRS Reg. § 54.4980B-2, Q&A-6(c).

- For ERISA purposes, a plan is deemed to not be established under a collective bargaining agreement for any plan year in which the agreement is a scheme, plan, stratagem, or artifice of evasion, a principal intent of which is to evade compliance with state law and regulations applicable to insurance. 29 CFR § 2510.3-40(c)(2).

- In the multiemployer pension plan context, withdrawal liability exists under ERISA § 4212(c) where one of the primary purposes of the transaction is to avoid withdrawal liability, even if that isn't the only purpose. See Santa Fe Pacific Corp. v Central States, Southeast & Southwest Areas Pension Fund, 22 F3d 725 (7th Cir. 1994).

In addition, with respect to any IRS or DOL audit, senior agents/investigators have wide discretion in assessing and waiving penalties. They have been known to go much easier on employers that appear to be making honest efforts to comply; they are generally less inclined to be kind when plan sponsors are taking advantage of the flexibility they have with respect to operating and administering plans.

SBC

Notice of a modification to enrollees should be provided no later than 60 days prior to the date the modification will take effect because the group health plan is making a material modification to the SBC outside of renewal or reissuance (e.g., a mid-year plan design change).