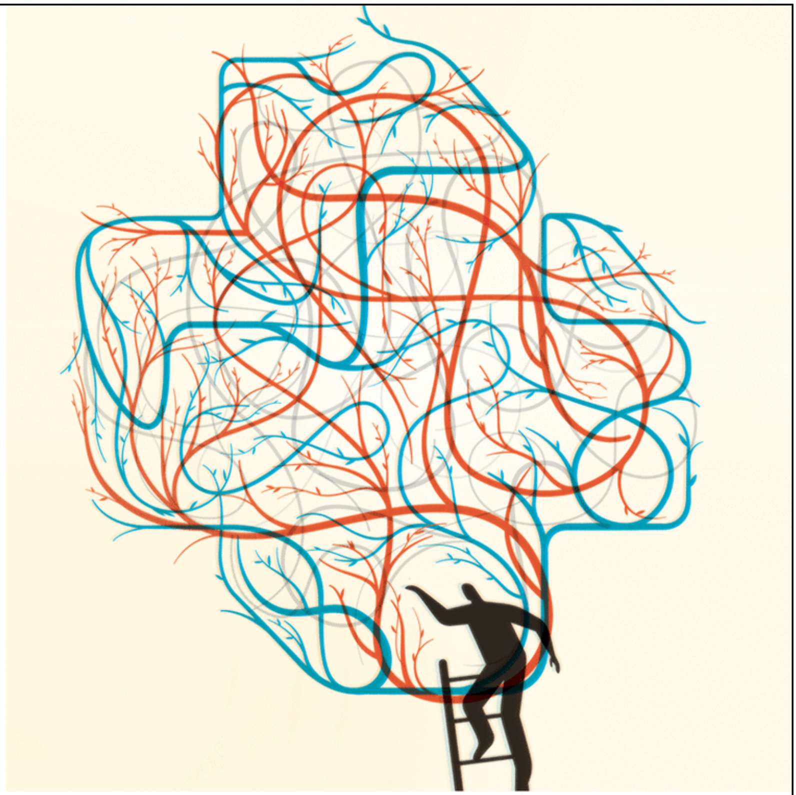
Second Opinions



Pay Pulls

Proposed regulation on PPACA premium tax credit

ON AUGUST 17, 2011, the Department of Treasury and the IRS published a proposed regulation on the implementation of the PPACA premium tax credit provisions.

In general, the proposed regulation clarifies which individuals are eligible for federal premium assistance to enroll in a qualified health plan through an exchange and how that assistance will be calculated. Importantly, the proposed regulation also provides guidance as to the circumstances under which employers will be subject to the "shared responsibility" penalty (which some have referred to as the "play or pay" or "employer mandate" penalty). This generally applies to employers with 50 or more full-time employees and depends in part on whether an employee (or employees) of the employer receives a federal premium tax credit for health insurance coverage through an exchange.

When is an individual eligible for "minimum essential coverage" under an employer-sponsored plan for purposes of the employer mandate penalties?

Under PPACA, the applicability of the employer mandate penalty depends in part on whether an employee qualifies for a premium tax credit with respect to health coverage through an exchange. In general, an individual is not eligible for a premium tax credit if he is eligible for "minimum essential coverage" (other than in the individual market). Minimum essential coverage generally includes coverage under an "eligible employer-sponsored plan."

The proposed regulation provides some guidance on what it means to be "eligible for an employer-sponsored plan." An individual is "eligible" for minimum essential coverage from an employer-sponsored plan if the individual "had the opportunity to enroll in the plan," even if the individual fails to enroll (and the individual generally is not eligible for premium tax credits in the months thereafter in that year). However, an individual is only eligible for minimum essential coverage from an employer-sponsored plan if the plan is affordable and provides minimum value.

Is self-funded employer-sponsored coverage treated as "minimum essential coverage" under the PPACA employer "play or pay" penalty?

The preamble to the proposed regulation provides that future regulations defining minimum essential coverage are expected to provide that self-funded, employer-sponsored plans are considered minimum essential coverage. Such guidance would clarify the meaning of ambiguous language in the PPACA statutory language.

Is COBRA coverage treated as "minimum essential coverage" for these purposes?

The proposed regulation provides that COBRA coverage is minimum essential coverage only if the individual actually enrolls in the coverage. This means that a former employee would not be required to enroll in COBRA coverage before becoming eligible for premium tax credits through an exchange.

How is the minimum value of employer coverage to be determined for purposes of the employer mandate penalty?

An individual is treated as eligible for minimum essential coverage from an employer-sponsored plan only if the plan provides "minimum value." Under PPACA, this means that a plan's share of the total allowed costs of benefits provided must be at least 60%. According to the preamble, HHS is expected to issue regulations on how this percentage

 Illustration by Harry Campbell

is determined later this year, and future regulations are expected to recognize that self-funded, employer-sponsored plans and health insurance coverage offered in the large-group market are not required to provide each of the essential health benefits or the 10 categories of essential health benefits described in PPACA. It also indicates that Treasury and the IRS are considering whether to provide transition relief with respect to the minimum value requirement.

For purposes of the PPACA employer "play or pay" penalty, is the affordability of employer-sponsored coverage calculated based on the employee's contribution to self-only coverage or family coverage?

An individual is treated as eligible for minimum essential coverage from an employer-sponsored plan only if the coverage is affordable. Under PPACA, employer-sponsored coverage is deemed to be unaffordable if the contribution for self-only coverage exceeds 9.5% of household income. The proposed regulation confirms that the affordability of employer-sponsored coverage for purposes of the employer mandate is calculated based on the employee's contribution to self-only coverage, not family coverage. In addition, it clarifies that an employer-sponsored plan is also affordable for dependents if the employee's contribution for self-only coverage does not exceed 9.5% of household income. The preamble notes, however, that future regulations regarding the individual mandate requirement (i.e., the provision that will penalize individuals who fail to obtain health-care coverage) are expected to provide that "affordability" for purposes of the individual mandate will be based on the required contribution for family coverage.

Could an employer be subject to the employer "play or pay" penalty because the coverage it offers to employees is considered to be unaffordable, even if the employer has no way of knowing an employee's household income?

The preamble to the proposed regulation provides that future regulations are expected to provide employers with a safe harbor for purposes of triggering the employer mandate penalty with respect to the affordability of employer-sponsored coverage. Under the expected safe harbor, employers could calculate affordability based on the employee's W-2 wages from the employer (not household income). The safe harbor is expected to provide that, if an employer offers its full-time employees (and dependents) the opportunity to enroll in employer-sponsored minimum essential coverage, the employer would not be penalized if an employee receives a premium tax credit because the coverage was determined to be "unaffordable" by the exchange, so long as the employee's required contribution does not exceed 9.5% of the employee's current W-2 wages from the employer.

Are there any other safe harbors in the proposed regulation that might affect employers?

The proposed regulation provides generally that, if an individual's employer coverage is determined by an exchange to be unaffordable at the time of the individual's enrollment in the exchange, it is treated as unaffordable for the entire plan year (and, thus, the individual remains eligible for the tax credit), even if the individual's income changes during the year. According to the preamble, future regulations under the employer mandate are expected to provide that an employer will not be penalized if an employee receives a premium tax credit for "unaffordable" coverage in these circumstances, so long as the employer otherwise offered affordable coverage that meets the employer mandate requirements.

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These Q&As first appeared on www.plansponsor.com in September 2011. As health-care law is evolving rapidly, there may be further developments since the initial publication.

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