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IRS Health Coverage Reporting Instructions Leave Many Questions Unanswered

The Affordable Care Act (“ACA”) amended the Internal Revenue Code (“Code”) to add sections 6055 and 6056 (see <http://www.groom.com/resources-881.html>). These two new provisions of the Code impose new information tax reporting requirements on certain employers and insurance carriers. Very generally, Code section 6055 requires most providers of coverage to report regarding those individuals enrolled in minimum essential coverage. Code section 6056 requires tax reporting by employers subject to the employer shared responsibility provisions of Code section 4980H.

On August 28, 2014, the Internal Revenue Service (“IRS”) released draft instructions and re-released certain revised draft forms that will be used by insurance issuers, employers, and other entities for this federal tax information reporting. The IRS also published FAQs regarding information reporting on the following day, August 29. These reporting requirements apply beginning in 2015 (with the first reporting due in early 2016). The Code sections 6055 and 6056 regulations left many open questions about the mechanics of the reporting, and it was hoped that the draft instructions and forms would supplement the regulations by providing additional guidance regarding how this reporting is intended to work in practice. While the release of the instructions and forms allows issuers and employers to begin the process of designing systems for reporting, many unanswered questions remain regarding these complex requirements. This Benefits Brief will provide a roadmap of the new draft forms, based on the draft instructions, and an overview of how the reporting is supposed to work, while also focusing on some of the open questions that remain.

Forms 1094-B and 1095-B (Minimum Essential Coverage Reporting)

Code section 6055 requires issuers and employers that sponsor self-funded plans and other entities that provide “minimum essential coverage” (“MEC”) to file an annual report with the IRS and issue annual statements to covered individuals indicating the calendar months in a given year in which individuals were enrolled in MEC. The reported information will then be used by the IRS to substantiate a taxpayer’s compliance with the individual mandate. The corresponding statements will be used by the individual to complete their tax return and establish that they had MEC during particular months.

The IRS has now released two forms in connection with the MEC reporting requirement. Form 1094-B is the transmittal form to be used for MEC reporting and Form 1095-B is the reporting form for MEC reporting. Form 1094-B and Form 1095-B will be used by:

- Health insurance issuers or carriers (provided that they will not report coverage under the Children’s Health Insurance Program (“CHIP”), Medicaid, Medicare (including Medicare Advantage), or individual insurance coverage provided through a health insurance
- Sponsors of single employer self-insured group health plans that are not reporting as applicable large employer members, and/or are reporting with respect to non-employees;
- Sponsors of other self-insured group health plans (such as multiemployer plans or MEWAs); and
- Government sponsors of coverage under certain governmental programs.

Please note that applicable large employers subject to the employer mandate which sponsor self-insured coverage will not file the Forms 1094-B and 1095-B for their employees, but will instead provide the required MEC reporting on the Form 1095-C, as discussed below.

Filers of 250 or more Forms 1095-B must file all Forms 1094-B and 1095-B electronically.

Forms 1094-C and 1095-C (Employer Mandate Reporting)

Code Section 6056 requires each “applicable large employer member”¹ (“ALE member”) to file an annual return with the IRS, and issue annual statements to full-time employees about the coverage (if any) offered to the employee, by month, including the lowest employee cost of self-only coverage offered. The purpose of Code section 6056 reporting is three-fold. One purpose is to provide the IRS with the information necessary to enforce an employer’s compliance (or lack thereof) with the employer mandate provisions of the ACA (Code section 4980H). A second purpose is to help the IRS determine if an individual is eligible for federal premium tax credits and cost-sharing reductions (the individual’s eligibility for those tax subsidies may be affected by whether he or she had access to affordable employer-sponsored coverage that provides minimum value). Finally, the statement provided to the employee will help the employee understand whether he/she may be eligible for a premium tax credit for his/her federal taxes. If the employer provided health coverage that was not MEC, or if the coverage did not provide minimum value or was not affordable, and the employee purchased individual health insurance through a health insurance Marketplace, the employee might be eligible for a premium tax credit (depending on multiple factors, including the employee’s income for the year).

Similar to the MEC reporting, the IRS has issued two draft forms for the employer mandate reporting: Form 1094-C and Form 1095-C. Form 1094-C is the transmittal form to be used for employer mandate reporting and Form 1095-C

¹ Very generally, an “applicable large employer” is any employer that employed on average 50 or more full-time employees or equivalents over the 12 months of the preceding calendar year. An “applicable large employer member” includes both a single applicable large employer, as well as any “single” member of a controlled group that collectively meets the definition of applicable large employer. In other words, the determination of whether an entity employed on average 50 or more full-time employees or equivalents is made at the controlled group level, but the Code section 6056 reporting requirements apply on a member-by-member basis to each member of that controlled group (regardless of how many employees that particular member of the controlled group had). It is not entirely clear how a “single” member is defined. One interpretation is that an entity that has its own separate EIN would be a “single” member, but neither the regulations nor the instructions provide additional guidance on this point.

is the reporting form for employer mandate reporting. Form 1094-C and Form 1095-C will be used by ALE members only. In addition, ALE members that sponsor self-insured group health plans will provide MEC reporting on these forms (and will not file Form 1094-B and Form 1095-B with respect to the coverage provided to its employees).

As with MEC reporting, filers of 250 or more Forms 1095-C must file all Forms 1094-C and 1095-C electronically.

Issues For Consideration

There are still many questions regarding how the reporting process will work in practice. Some of the most significant are as follows:

- **Reporting for a Group of Related Entities.** The Code section 6055 final regulations clarified that each separate entity providing MEC had an independent filing obligation. For example, if a self-insured group health plan covers employees of multiple employers in a controlled group, each employer has a separate reporting requirement for its respective employees. However, the preamble to the final regulations provided that “one member of a controlled group may assist the other members by filing returns and furnishing statements on behalf of all members... Employers in controlled groups that are not applicable large employer members... and reporting entities (such as issuers) that are not reporting as employers, may report... as separate entities, or one entity may report for the group.”

Therefore, the preamble seems to suggest that one issuer could report for all of its related entities (for example, a “parent” issuer could report on behalf of its subsidiaries) or one employer in a controlled group could report on behalf of the other members of that controlled group. However, it is not entirely clear how such reporting would occur under the forms as drafted. One possibility is that the entity reporting for the group could put its information on the Form 1094-B transmittal as “filer,” and report the information regarding the entity for which it is reporting on the 1095-B. Additional guidance is needed to confirm whether this would be acceptable.

Similarly, the preamble to the Code section 6056 final regulations stated that “ALE members are permitted to contract with and use third parties to facilitate filing returns and furnishing employee statements to comply with section 6056, although ALE members remain responsible for reporting under section 6056...” As an example, the final regulations stated that an ALE member that was part of a group of ALE members treated as a single employer under the IRS “controlled group” rules could facilitate the filing of returns and furnishing of employee statements on behalf of other members of the group. The regulations also stated, “Further details will be provided in forms and instructions to accommodate third parties in facilitating section 6056 reporting for ALE members (including for third party service providers and multiemployer plan administrators).” However, neither the draft instructions nor the Forms provide such additional details, and therefore it currently is unclear how third parties are to file on behalf of other entities.

- **Reporting for Insurance Provided to Multiple Employers.**

Part II of the Form 1095-B requires reporting about employer-sponsored coverage, including the name, address, and EIN for each employer. This potentially poses challenges for arrangements where multiple employers are provided insurance through an arrangement sponsored by a third party. For example, an insured multiemployer health plan is typically sponsored by a joint board of trustees but provides insurance

to multiple employers that collectively bargain to participate in the plan. Professional employer organizations (“PEOs”) also sponsor insured plans in which multiple client employers may participate.

The preamble to the final regulations under Code Section 6055 does state that the final regulations “do not require sponsors of multiemployer plans to report the EINs of the participating employers. The regulations require only health insurance issuers to report the EIN of the employer sponsoring an insured group health plan.” However, it is not entirely clear if this guidance applies to insured as well as self-insured multiemployer plans. Therefore, it is also unclear whether an insurer that insures a multiemployer plan must report each participating employer’s information in Part II of the Form 1095-B or reports the information of the association, committee, joint board of trustees, or other similar group. Having to report each employer’s information would be administratively difficult and costly for issuers that insure multiemployer plans with many participating employers. The same uncertainty exists with respect to insured coverage provided to plans sponsored by PEOs.

- **Distribution of Filings to Employees**

Filers of Form 1095-B and Form 1095-C must furnish a copy of any form filed to the person identified as the “responsible individual” or “employee” on the form. The statement must be furnished on or before January 31 of the year following the calendar year the coverage is provided. However, the instructions provide that the copy “must be furnished on paper by mail, unless the recipient affirmatively consents to receive the statement in an electronic format.” Many employers likely were anticipating providing the forms by hand delivery or intra-office mail to their employees, so the IRS needs to clarify whether this is an alternative option. Otherwise, employers that want to avoid having to mail the forms will have to obtain affirmative consent from its employees to distribute the forms electronically, which likely will be challenging.

- **Reporting for Non-Employees**

It is unclear how to perform reporting for non-employees enrolled in a self-insured employer plan. For example, a divorced spouse may be covered by an employer plan through COBRA, or a former employee may be receiving COBRA coverage or retiree coverage (in the year of retirement, the employer must report for the retiree on Form 1095-C). The instructions to the draft Form 1095-C state that employers are only required to report on Form 1095-C for employees, and that non-employees (for example, non-employee directors) enrolled in self-insured coverage are reported on Form 1095-B. Thus, it may be that retirees enrolled in the self-insured coverage and individuals receiving COBRA are reported on Form 1095-B, but the instructions are not clear on this point.

- **Requirement to Provide a Single Form 1095-C to Employee**

The instructions confirm that a single Form 1095-C must be filed by an employer for each full-time employee. For example, if an employer has two divisions and reports separately for those divisions, and a full-time employee worked at both divisions during the calendar year, the employer it must combine the information so there is only a single Form 1095-C for that employee which reports information for all twelve months of the year. However, if a full-time employee works for separate ALE members that are part of the same controlled group under IRS rules, it must receive a separate Form 1095-C from each employer. This may be very complicated for employers to administer.

- **Requirement to Perform 1095-C Reporting Even if Transition Relief Applies**

Certain transition relief under the employer mandate regulations limits employers' liability under Code Section 4980H for 2015. Notably, however, even if an employer does not have an obligation to offer coverage to an employee due to employer mandate transition relief, it appears that it still has an obligation to accurately report coverage offered (or not offered) on a Form 1095-C. The instructions state that the transition relief "is solely for the employer for purposes of section 4980H and does not affect the employee's potential eligibility for the premium tax credit. Accordingly, regardless of whether the employer is eligible for relief under section 4980H for an employee for one or more months, the Form 1095-C for that employee must accurately reflect the health coverage offered to that employee (if any) during that period, including, if applicable, the required employee contribution."

For example, if an ALE member has between 50 and 99 full-time employees (including full-time equivalents) and meets certain requirements, it will not be subject to the employer mandate until 2016. However, it appears based on the instructions that the employer will still have to prepare a Form 1095-C for all of its full-time employees based on 2015 coverage, and file the Forms in early 2016 so that the IRS can administer the premium tax credit for those employees.

Conclusion

The release of the IRS forms and instructions highlights the significant challenges ahead in regard to the implementation of these information reporting requirements. If there is a silver lining, it may be that the initial reporting is not due until early 2016 and therefore, there is time for additional guidance to be released. Notably, the IRS is accepting comments on the draft forms and instructions- there is no express deadline, but informally the IRS has said that comments should be submitted by November 3, 2014. It is also noteworthy that the IRS reserved on the instructions regarding correcting these Forms after filed. Accurate reporting is likely to be difficult, particularly in the first few years. The IRS has already indicated that penalties will generally not be imposed on entities that can show they have made good faith efforts to comply with the information reporting requirements in 2016, and hopefully the IRS will continue to enforce these requirements liberally as employers and issuers adjust to the new reporting regime.