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BENEFITS BRIEF

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Authors: Christine Keller, Seth Perretta, Malcolm Slee

If you have questions, please contact your regular Groom attorney or one of the attorneys listed below:

Jon W. Breyfogle
jbreyfogle@groom.com
(202) 861-6641

Lisa M. Campbell
lcampbell@groom.com
(202) 861-6612

Thomas F. Fitzgerald
tfitzgerald@groom.com
(202) 861-6617

Katy S. Kamen
kkamen@groom.com
(202) 861-6646

Christine L. Keller
ckeller@groom.com
(202) 861-9371

Tamara S. Killion
tkillion@groom.com
(202) 861-6328

Rachel Leiser Levy
rlevy@groom.com
(202) 861-6613

Mark C. Nielsen
mnielsen@groom.com
(202) 861-5429

Seth T. Perretta
sperretta@groom.com
(202) 861- 6335

Malcolm C. Slee
mslee@groom.com
(202) 861-6337

Christy A. Tinnes
ctinnes@groom.com
(202) 861-6603

Allison Ullman
aullman@groom.com
(202) 861-6336

Brigen L. Winters
bwinters@groom.com
(202) 861-6618

Joel D. Wood
jwood@groom.com
(202) 861-6656

An Action Plan For Employers Who Receive Exchange Notices (Spoiler Alert- the Action Plan May Be "Do Nothing")

In recent weeks, many employers have been receiving notices from the federally-facilitated marketplace ("FFM"), or state-administered public exchanges (generally, "Exchanges"), advising that one of their employees has been found eligible for advance payments of a premium tax credit or cost sharing reduction ("APTC") during 2016. The notices advise that when the employee applied for health coverage through the Exchange, he or she indicated one of the following: (1) no offer of health coverage was made by the employer; (2) an offer of health coverage was made but it wasn't "affordable" or "minimum value"; or (3) the employee couldn't enroll in health coverage because he or she was in a waiting period. Finally, the notice advises the employer that it can appeal the determination that the employee is eligible for the APTC.

The question for employers is: what to do with these notices? As an initial matter, it is important to reinforce that **receipt of the notice does NOT mean that the employer has been assessed a penalty under the Affordable Care Act's ("ACA's") employer shared responsibility, or "employer mandate" rules, for failing to offer sufficient coverage to the employee.** Those penalties will be assessed by the Internal Revenue Service ("IRS") under a completely different process, described below. However, there are reasons why an employer might want to take action, including possibly filing an appeal with the Exchange, if there is reason to believe that the employee provided incorrect information to the Exchange about his or her access to employer-sponsored coverage.

Background

The federal government is establishing two different processes for communicating with employers– a "notification" process through the Exchanges, and a "certification" process through IRS/Treasury. The distinction between the two processes is much of where the confusion arises.

The "notification" process through the Exchanges serves as a "heads-up" that an employee has been found to be eligible for an APTC. This notice is being provided to employers as part of the FFM or state exchange's efforts to determine whether an individual should be found conditionally eligible for APTCs. In contrast, the "certification" process is how employer shared responsibility penalties will actually be assessed. Notably, the IRS has not yet set up the certification process, but it will give employers the right to appeal those assessments. We expect the IRS will provide additional information about the certification process by the end of 2016.

Since employer shared responsibility penalties (i.e., employer mandate penalties) can only be triggered if a full-time employee goes to an Exchange, enrolls in individual coverage and receives a premium tax credit from the federal government, the notification signals to the employer that they could become liable for an employer shared responsibility penalty in the future. However, it is worth noting that notifications are sent to all employers of individuals who are found to be APTC-eligible- including those employers that are not subject to employer shared responsibility because they have less than 50 full-time employees (including full-time equivalents).

One possible reason for this is that the notification serves a purpose for the Exchange as well. An employee generally is ineligible for the premium tax credit if the employee is offered minimum essential coverage under an eligible employer-sponsored plan that is affordable and provides minimum value, or if the employee actually enrolls in employer-sponsored minimum essential coverage (regardless of whether that coverage is affordable and provides minimum value). When an individual applies for coverage from the Exchange, the Exchange has no independent ability to verify the information provided regarding his or her access to employer-sponsored coverage. Therefore, by giving the employer the ability to appeal, the Exchange is soliciting information from the employer that will help it verify whether it correctly determined that the employee is eligible for the APTC.

Employers should also keep in mind that different Exchanges may be sending different notification forms, may have marginally different processes for employer appeals, and may provide different levels of detail regarding the employee. A few state-operated Exchanges have been sending out notifications for some time. In late 2015, the Centers for Medicare and Medicaid Services ("CMS") issued a FAQ in which they advised that the FFM would begin sending out notifications in 2016. The FAQ specifically noted that this would have no impact on potential employer shared responsibility penalties for 2015, which as noted above, will be assessed through the IRS "certification" process. A few weeks ago, the FFMs sent out their first batch, which explains the sudden flood of notifications received by employers.

Action Items For Employers Who Receive an Exchange Notice

Below we lay out several alternative action items for Employers who receive an Exchange Notice– along with the pros and cons of using each approach:

- Action Item 1: Do nothing. This would be the obvious approach if it appears the information the Exchange has is correct (i.e., the employer concedes that coverage wasn't offered to the employee) or if the notice does not contain enough information for the Employer to confirm the identity of the employee. However, even outside of these two circumstances, it is worth remembering that participating in the Exchange appeal process is strictly voluntary, and there may be other reasons why an employer might decide to bypass the process altogether.

  For example, employers that are not subject to employer shared responsibility have no reason to worry about potential penalties, so there may be no direct benefit to the employer from participating in the Exchange appeal process. Other employers might decide they will simply wait and see if they receive a "certification" from the IRS indicating that they owe an employer shared responsibility penalty, and address the situation at that time. Given that the Exchange "notification" appeal process and IRS "certification" appeal processes are completely separate, we have no reason to believe that failure to appeal through the notification process will prejudice the employer in any way if they ultimately have to go through the certification appeal process.

- *Action Item 2: Go through the Exchange appeal process*. An alternative to doing nothing would be to fully engage in the Exchange appeals process. However, this option raises some challenges, so we recommend a careful consideration of the advantages and disadvantages outlined below:

Advantages:

- **Correct the Record**. If it appears the employee has provided incorrect information that could result in the IRS assessing an employer shared responsibility penalty at some point in the future, the Exchange appeal process gives the employer the opportunity to correct the record. If the Exchange accepts the employer's explanation, this eliminates the concern of being assessed a penalty by the IRS in the future.

- **Help the Employee**. If the employee is found eligible for the APTC based on incorrect information and he or she is not, in fact, eligible for an APTC, that individual will have to pay back the APTC to the IRS. Presumably, it is in the employee's best interest to have this cleared up as quickly as possible so they do not face an unexpected federal tax liability when they prepare their income tax return for the year.

Disadvantages:

- **Administrative Burden**. Employers (particularly larger ones) may find that managing the appeals process for many different employees is time-consuming and administratively challenging. At the current time, there is not much specific information regarding how the FFM appeal process will function. Some of the state Exchanges have implemented appeals processes that provide for telephonic hearings. While it is far from clear that the FFM appeal process will do so, there may be some give-and-take with the Exchange if the information provided by the employee is inconsistent with the information provided by the employer.

- **Employee Dissatisfaction**. Participating in the Exchange appeal process potentially places the employer in an adversarial position with regard to the employee. While the employee may have simply inadvertently failed to accurately describe the available employer-sponsored coverage to the Exchange, the employee could resent the fact that the employer is challenging his or her entitlement to valuable tax credits, which could impact the employee's ability to pay for health coverage. The perception could be that that the employer is punishing the employee for potentially exposing it to employer shared responsibility penalties.

➢ *Action Item 3: Write a letter to the Exchange and the employee describing the offer of employer-sponsored coverage, without formally following the Exchange appeal process*. This would be a middle ground for employers that want to make sure that they are on record correctly describing the employer-sponsored coverage, without necessarily immersing themselves in the Exchange appeal process.

There are many different forms such a letter could take. One possibility is as follows: The letter would be addressed to the employee and would advise the employee that the employer had received a notice from the Exchange regarding the employee's APTC eligibility. It would further explain that while the Exchange will ultimately determine the employee's eligibility for the premium tax credit, the employer's records show that an offer of minimum value coverage was made. The letter would also describe the lowest cost for self-only coverage made to the employee (which will allow the employee and the Exchange to determine if the coverage was "affordable" for the employee) and the months in which the employee was covered. Finally, the employer could explain that a copy of the letter will be provided to the Exchange (and the IRS, if an employer shared responsibility penalty is assessed based on the determination that the employee was eligible for a premium tax credit).

One advantage of this third option is that the employer could create a boilerplate letter that can be used in response to all Exchange notifications- regardless of whether they are from a state Exchange or the FFM. It also provides the Exchange with the information needed to evaluate whether it correctly determined the employee's APTC eligibility without compelling the employer to go through the appeal process.

For employers considering this option, it is important that the tone of letter be informational in tone to ensure that the letter does not provide a basis for a claim that the employer is retaliating against the employee for attempting to claim the premium tax credit, which would be a potential violation of Section 18C of the Fair Labor Standards Act ("FLSA").

Other Issues Worth Considering

As noted above, each employer will have to determine its approach for addressing the Exchange notifications. Below are some other important considerations that may be relevant.

Complications relating to the "affordability" test. An individual is not eligible for the premium tax credit if he or she is offered minimum value employer-sponsored self-only coverage that is "affordable." The coverage is considered "affordable" if it that costs less than a threshold percentage of the employee's modified adjusted gross household income ("MAGHI"). The threshold percentage was originally 9.5%, but it is adjusted every year- for 2016, the threshold percentage is 9.66%.

If employers do not offer "affordable" minimum value, minimum essential coverage to their full-time employees, they risk assessment of an employer shared responsibility penalty. The "affordability" test for the premium tax credit is based on the employee's MAGHI—but an employer has no way of knowing an employee's MAGHI. In order for employers to have some comfort that they could design the cost of coverage in a way that limited their exposure to employer shared responsibility penalties, the IRS developed "affordability safe harbors" in the employer shared responsibility regulations. Those safe harbors permitted employers to determine the affordability of their coverage based on any of the following: (i) an employee's wages for the calendar year as reported in Box 1 of his or her Form W-2 ("W-2 Safe Harbor"), (ii) the employee's hourly rate of pay, so long as the hourly rate of pay remains unchanged ("Rate of Pay Safe Harbor"), or (iii) 100% of the Federal Poverty Line ("Federal Poverty Safe Harbor"). If an employer meets the requirements of a safe harbor, the offer of coverage is deemed affordable for purposes of employer shared responsibility regardless of whether it is affordable to the employee under the premium tax credit rules.

With this as background, employers should keep in mind the following, which will complicate the determination of whether the coverage is "affordable" for the employee:

- An Exchange's determination of an individual's eligibility for an APTC will necessarily be based on an estimate of the individual's MAGHI. The Exchange will be able to access IRS records of the individual's MAGHI as most recently reported on a federal tax return, but that information may not accurately reflect the individual's MAGHI at the time he or she applies for Exchange coverage, if circumstances have changed.

- An employer may not have certainty whether the coverage offered for a particular month during the current year is "affordable" under an affordability safe harbor. For example, under the W-2 Safe Harbor, technically the employer will not be sure if the safe harbor will be met until the calendar year is over and the employer can review the wages reported in Box 1 of Form W-2.

- Even if an employer has certainty that the coverage offered for a particular month satisfies an affordability safe harbor, the Exchange will be basing its determination of affordability on the individual's projected MAGHI. It is technically possible for an offer of coverage to meet an affordability safe harbor, but still not be

considered affordable for the individual under the premium tax credit rules. (In these circumstances, the individual will maintain eligibility for the premium tax credit, but the employer will not be assessed an employer shared responsibility penalty with regard to the individual.)

For these reasons, if the employer decides to file an appeal with the Exchange or send a letter to the employee and Exchange as described above, it may be advisable not to refer to the offer of coverage as "affordable," and instead simply provide the cost of self-only coverage and the months for which it was offered.

Complications related to where the Exchange notifications are being sent. In the FAQ it released last year, CMS indicated, "For 2016, the FFM will send notices to the mailing address of the employer provided by the employee on his or her application for Marketplace coverage. As the FFM continues implementation of the employer notice program, it will consider alternative ways of contacting employers." Therefore, it appears that the FFM is directing notices to employers at the addresses provided to it by the individuals.

In 2013, when HHS released the application for individuals to use to enroll in Exchange coverage, they included an "Employer Coverage Tool" which individuals could take to their employers and ask them to complete in order to get answers to certain questions in the application. Since the Exchanges are directing the notifications to the addresses provided by individuals, this might be a reason for employers to encourage use of the "Employer Coverage Tool" in order to ensure that notices are directed to the correct addresses.

Employers with multiple locations will need to coordinate with their various branches to make sure that any Exchange notifications received are directed to the individuals delegated authority to handle them. In addition, professional employer organizations ("PEOs") will likely receive notices that should have been directed to their client employers, and vice versa. It is important that PEOs communicate with their client employers to discuss who will be responding to the notices. A strategic decision will have to be made regarding whether it is productive to try and explain the co-employment relationship to the Exchange, when it may just confuse the individuals processing the appeal.

Complications related to employment classification. Some employers have received Exchange notifications related to individuals who have identified themselves as "employees" to an Exchange, but are in fact independent contractors. In these circumstances, it may be in the employer's best interest to vigorously appeal the individual's status at the Exchange level in the hopes of resolving the matter before it is referred to the IRS to head off a potential worker classification audit.

Complications related to employee's spouses. Some employers have received Exchange notifications related to employees' spouses. There is no obligation under the employer shared responsibility rules for an employer to offer coverage to an employee's spouse, so the employer could ignore the notification without having to be concerned about a possible IRS certification in the future. However, if the employer did offer affordable minimum value self-only minimum essential coverage to the employee, the spouse is disqualified from premium tax credit eligibility. If that is the case, the employer will have to make a decision regarding whether it is better to notify the employee's spouse and Exchange in order to ensure that all parties have a clear understanding of the spouse's eligibility for the premium tax credit, or to do nothing instead.

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If you receive an Exchange notification and would like guidance regarding next steps, please contact the attorneys listed above or your regular Groom Law Group attorney.