SOLUTIONS LAW PRESS

HR & BENEFITS UPDATE

New Insured Group Health Plan Non-Discrimination Rules Create Significant Liability For Employers & Insurers; Prompt IRS Also To Review Self-Insured Group Health Plan Rules

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Non-grandfathered insured group health plans that impermissibly discriminate in favor of highly compensated employees in post-September 22, 2010 plan years face significant liability under new rules enacted as part of the Patient Protection and Affordable Care Act (Pub. L. 111-148), as amended by the Health Care and Education Reconciliation Act (the Reconciliation Act), Pub. L. 111-152 (collectively the "Affordable Care Act"). Given these significant new liability exposures, employers and insurers that presently sponsor insured group health plans that discriminate in favor of highly compensated employees must quickly redesign their programs to comply with the Affordable Care Act's new nondiscrimination rules unless the program qualifies as exempt from the new rules as a "grandfathered plan."

Concurrently, sponsors of insured and self-insured group health plans alike will want to keep a close eye out for anticipated changes in the Internal Revenue Service's (IRS') regulations interpreting the non-discrimination rules under Internal Revenue Code section 105. In connection with the implementation of the Affordable Care Act's new nondiscrimination requirements for insured group health plans, the Internal Revenue Service has announced that it both is evaluating the regulatory guidance needed regarding the new rules, as well as reviewing the adequacy of its guidance concerning the self-insured group health plan nondiscrimination requirements under Code section 105(h). Employers and others concerned about the content of these new regulations should consider sharing their input with the IRS in response to the invitation for public comment set forth in Notice 2010-63, which is scheduled for official publication in Internal Revenue Bulletin 2010-41 on October 12. To review an advance copy of Notice 2010-63, see **here**.

Post Affordable Care Act Group Health Plan Nondiscrimination Requirements

Prior to the Affordable Care Act, federal law allowed insured group health plans and their insurers significant freedom to discriminate in favor of highly compensated employees. Insured group health plans and their insurers generally have been exempt from prohibitions against discrimination in favor of highly compensated employees applicable to self-insured plans under Internal Revenue Code section 105(h).

Beginning with post September 22, 2010 plan years, however, the Affordable Care Act generally amends the Code and the Employee Retirement Income Security Act (ERISA) to impose significant penalties for insured group health plans and health insurance issuers providing health insurance coverage in connection with group health plans that fail to satisfy nondiscrimination requirements similar to the non-discrimination rules currently applicable to self-insured group health plans under Code Section 105(h) unless the arrangement qualifies as a "grandfathered plan."

Under the Affordable Care Act, significant plan liabilities attach to the failure of a non-grandfathered insured group health plan that discriminates in favor of highly compensated

employees in violation of the new Affordable Care Act rules. An insured group health that fails to comply with Code section 105(h) will be subject to a civil action to compel it to provide nondiscriminatory benefits and the plan or plan sponsor will be subject to an excise tax or civil money penalty of $100 per day per individual discriminated against by the discriminatory plan.

In contrast, self-insured group health plans will remain subject to the nondiscrimination rules of section 105(h) of the Code and its attendant tax-consequences. Highly compensated employees receiving discriminatory benefits under a self-insured group health plan will continue to face income tax income on excess benefits received under Code section 105(b). While self-insured group health plans, their sponsors and administrators must properly calculate and report this resulting additional taxable income, they presently escape the excise tax and civil enforcement exposures that would apply under the Affordable Care Act had their plan been insured.

Because of the significant liability exposures that result if an insured group health plan violates the new Affordable Care Act nondiscrimination rules, employers and insurers should act quickly to review all insured group health plan arrangements for possible prohibited discrimination in favor of highly compensated employees under the new Affordable Care Act rules. Unless the program will qualify as a grandfathered plan for purposes of the Affordable Care Act, employers or other sponsors, insurers, and administrators of these programs should take prompt action either to terminate or redesign the program as necessary to avoid violation of the new rule before the first post-September 22, 2010 plan year begins. With prompt action, it may be possible to preserve the ability to continue to maintain certain discriminatory insured group health plans by demonstrating that the arrangement existed before March 23, 2010 and otherwise qualifies as a grandfathered plan for purposes of the Affordable Care Act. Where it is not feasible to demonstrate that the plan qualifies as an exempt grandfathered plan, however, employers will want to take quick action to appropriately terminate or amend the arrangement and to timely communicate these changes to affected participants and beneficiaries.

For Assistance or More Information

If your organization needs assistance reviewing or updating your heath care program design, documentation, policies or procedures in response to the Affordable Care Act or other requirements or with other employee benefit, insurance or human resources matters, please contact the author of this update, Board Certified Labor & Employment attorney Cynthia Marcotte Stamer at (469) 767-8872 or via e-mail **here**.

Current Chair of the American Bar Association (ABA) RPTE Employee Benefit & Other Compensation Group, a Council Member of the ABA Joint Committee on Employee Benefits and Past Chair of the ABA Health Law Section Managed Care & Insurance Interest Group, Ms. Stamer continuously advises employers, health and other employee benefit plans, plan sponsors, fiduciaries, plan administrators, plan vendors, insurers and others about health program related legal, operational, documentation, public policy, enforcement, privacy, technology, litigation and risk management and other concerns. Ms. Stamer also publishes, conducts client and other training, speaks and consults extensively on these and other health and managed care program concerns and practices. She regularly speaks and conducts training for the ABA, American Health Lawyers Association, Institute of Internal Auditors, Society for Professional Benefits Administrators, HCCA, Southwest Benefits Association and many other organizations. Her insights on these and related topics have appeared in Atlantic Information Service, Bureau of National Affairs, World At Work, The Wall Street Journal, Business Insurance, Managed Healthcare, Health Leaders, various ABA publications and a many other national and local publications. To contact Ms. Stamer or for additional information about Ms. Stamer, her experience, involvements, programs or Publishers of her many highly regarded writings on health industry and human resources matters include the Bureau of National Affairs, Aspen

Publishers, ABA, AHLA, Aspen Publishers, Schneider Publications, Spencer Publications, World At Work, SHRM, HCCA, State Bar of Texas, Business Insurance, James Publishing and many others. You can review other highlights of Ms. Stamer's experience **here**.

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