New U.S. Guidance On Expatriate Health Plans

Insights
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As discussed in a prior post, the U.S. Internal Revenue Service ("IRS") is currently in the process of finalizing its regulations implementing the Affordable Care Act's ("ACA") "Employer Mandate." The Employer Mandate, which becomes effective January 1, 2015, generally requires "large" employers to offer their full-time employees (and their dependents) the opportunity to enroll in "minimum essential coverage" under an eligible employer-sponsored health plan or face a tax penalty.

In general terms, an employer-provided health plan constitutes "minimum essential coverage" if it meets substantially all of the ACA's new requirements for health plans, such as prohibitions on pre-existing condition exclusions, prohibition of annual and lifetime benefits, coverage of preventive health services, etc. Many such requirements only became effective at the beginning of this year.

An ongoing open issue with respect to "minimum essential coverage" and the Employer Mandate has been that of expatriate health plans.[1] Many multinational companies group expatriates together onto a special group plan. For example, in a case where a U.S.-based employee goes on temporary assignment to a foreign country, the employer in such a situation may switch the employee (at least temporarily) from its normal group health plan to an expatriate plan.

Expatriates will likely still be subject to the ACA's Individual Mandate (which requires U.S. citizens and other "applicable individuals" to maintain "minimum essential coverage" or face a tax penalty) and may, depending on the circumstances, implicate the Employer Mandate for their employers. As a result, whether the expatriate health plans constitute "minimum essential coverage" is quite important both to employers and expatriates.

Expatriate health plans are often faced with a variety of challenges. However, such plans face even more challenges now due to the slew of new requirements under the ACA. As noted by the U.S. Department of Labor, Department of Health & Human Services, and the Treasury Department:

". . . challenges in reconciling and coordinating the multiple regulatory regimes that apply to expatriate health plans might make it impossible or impracticable to comply with all the relevant rules [under the ACA] at least in the near term. For example, independent review organizations may not exist abroad, and it may be difficult for certain preventive services to be provided, or even be identified as preventive, when such services are provided outside the United States by clinical providers that use different code sets and medical terminology to identify services. Further, expatriate issuers may face challenges and delays in communicating with enrollees living abroad

expatriate issuers may face challenges and delays in communicating with enrollees living abroad, and, due to the complex nature of these plans, standardized benefits disclosures can be difficult for issuers to produce. Expatriate health plans may require additional regulatory approvals from foreign governments, and, in some circumstances, it is possible that domestic and foreign law requirements conflict."

In recognition of these difficulties, recent federal guidance offered temporary transitional relief (expanding on their initial transitional relief issued March 2013) under which insured expatriate health plans may be temporarily exempted from most of the ACA's market reform requirements. This temporary exemption applies provided that insured expatriate health plans comply with the pre-ACA Public Health Service Act and other applicable statutes and regulations under the Employee Retirement Income Security Act ("ERISA") and the Internal Revenue Code.

Expatriate health plans that comply with this transitional relief will be deemed "minimum essential coverage" and such relief may be relied on at least through plan years ending on or before December 31, 2016. As a result, employers may use this temporary relief to satisfy (at least in the near term) the Employer Mandate with respect to expatriate employees under which the offer of coverage might otherwise not be considered "adequate."

Unfortunately, the new guidance did not answer all questions on this issue. For example, though it is not entirely clear, it does not appear the transitional relief would apply in a case where an employer maintains a self-insured expatriate health plan.

Federal agencies indicated they are considering potential additional guidance on expatriate health plans. As a result, there is potential for additional transitional relief and further clarification as to unanswered questions on this subject.

This is Blog Post is the third part of an ongoing series on ACA issues affecting Cross-Border Employers.

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[1] For these purposes, an "insured expatriate health plan" is defined as "an insured group health plan with respect to which enrollment is limited to primary insureds for whom there is a good faith expectation that such individuals will reside outside of their home country or outside of the United States for at least six months of a 12-month period and any covered dependents, and also with respect to group health insurance coverage offered in conjunction with the expatriate group health plan."