

2014 – June, 30 2015 Relief from Employer Excise Tax for Small Employer & S Corporation Payment or Reimbursement of Individual Health Insurance Premiums

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Beginning in 2014, a violation of certain healthcare reform rules, such as offering a health plan with annual dollar limits or not providing full preventive care with no employee cost, requires employers to pay an excise tax of \$100 per affected employee per day (\$36,500 per affected employee per year) .¹ The IRS, DOL and HHS interpret a plan for employer reimbursement of employee health costs, including individual health insurance premiums, as itself a group health plan that cannot have an annual dollar limit and must pay for all required preventive care with no employee payment.² Thus, this subjected many employers to a \$36,500 per year per employee excise tax for payment or reimbursement of employees' individual health insurance policy premiums, as the reimbursement plan did cover preventive care and had a dollar limit equal to the insurance premium. The IRS has now granted temporary relief for small employers (those with less than 50 full-time and full-time equivalent employees) and S corporations but only as to reimbursement or payment of more than 2% shareholders individual health insurance premiums.

In 2013 and 2014, the IRS, DOL and HHS made several pronouncements, effective in 2014, overturning decades of common employer practices and significantly limited the use of employer payment plans ("EPPs") (whether health reimbursement accounts (HRAs), medical expense reimbursement plans (MERPs), or Section 125 cafeteria plans) when such plans pay or reimburse individual health insurance premiums and are not integrated with another employer group health plan. Such plans, however, can reimburse "excepted benefits,"³ such as stand-alone dental or vision care. There are also exceptions for plans covering a single employee (if the plan meets the tax nondiscrimination rules), and stand-alone (not integrated with employer health plan) HRAs/MERPs with no dollar limits, although few such plans exist due to the potential for unlimited claims to the employer.

IRS Notice 2015-17 provides relief from the assessment of this excise tax for small employers in 2014 and from January 1 through June 30, 2015 for impermissibly reimbursing individual health insurance premiums for two or more employees. Small employers are those who are not "applicable large employers" ("ALEs") under the employer mandate rules. This excise tax relief does not apply to HRAs and health FSAs that

improperly (by not being integrated with an employer's group health plan) reimburse medical costs that a health plan does not pay ⁴ unless the plan is exempt. Several employee benefits promoters continue to promote plans that supposedly allow employers to avoid these rules and continue to reimburse individual employee health insurance, but their chances of withstanding an IRS challenge and the \$36,500 per employee per year tax penalty are highly suspect, at least after June 30, 2015.

Notice 2015-17 makes four important points. First, relief is provided for 2014 and the first six months of 2015 for small employers that reimburse or pay a premium for individual health insurance policies for two or more active employees. Second, Notice 2015-17 also allows, at least through 2015, arrangements reimbursing premiums of more than 2%-shareholder ⁵ employees of S corporations, regardless of whether the corporation is a small employer. Third, Notice 2015-17 allows employer arrangements to fund Medicare or Tricare related health reimbursement arrangement (HRA), although these also are limited to use to employers with fewer than 20 employees by other federal laws. Fourth, Notice 2015-17 makes clear that across the board raises in compensation are not EPPs where they are not required to be spend on health coverage but any reimbursement of health costs, whether pre-tax or after tax, is an EPP or a prohibited stand-alone HRA (one not integrated with an employer group health plan).

While not explicitly stated in Notice 2015-17, the definition of a small employer requires counting all employees in a controlled group or an affiliated service group, as the Notice incorporates these rules by reference.⁶

If you have questions, please contact your Lathrop Gage attorney or the attorney listed above.

¹ IRC § 4980D(b)(1).

² Healthcare added ERISA § 715(a)(1) and Tax Code § 9815(a)(1) to incorporate the provisions of the Public Health Service Act ("PHSA") into ERISA and the Code, and make them applicable to both employer group health plans and to health insurance issuers providing health insurance coverage.

³ IRS Notice 2013-54; DOL FAQs About Affordable Care Act Implementation (PART XXII), available at <http://www.dol.gov/ebsa/pdf/faq-aca22.pdf>.

⁴ Notice 2015-17, Q&A 1.

⁵ A 2-percent shareholder means any person who owns more than 2 percent of the stock of the S corporation. See IRC §1372(b)(2).

⁶ Notice 2015-17, Q&A 1, referencing IRC § 4980H(c)(2)