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Interim Guidance on Informational Reporting to Employees on the Cost of Their Group Health Insurance Coverage

The American Payroll Association (APA) is a non-profit association of over 21,000 payroll professionals, most of whom are responsible for the payroll of approximately 17,000 employers throughout the 50 states, the District of Columbia, and the U.S. territories. As payroll specialists, APA's members must issue correct and timely pay; calculate proper tax withholding; remit taxes to federal, state, and local agencies; and file tax and information returns. One of APA's primary missions is to work with legislative and executive branches of all levels of government to find ways for employers to meet their requirements under law and support government objectives, while minimizing administrative burden for government, employers, and individual taxpayers.

The APA would like to thank the Internal Revenue Service for providing interim guidance on informational reporting to employees on the cost of their employer-sponsored group health insurance coverage through the issuance of Notice 2011-28. This requirement imposes a new burden on the payroll industry and involves gathering and reporting information that has never been required on Form W-2, *Wage and Tax Statement*. Form W-2 has historically been used only to report information related to employees' wages and taxes withheld. This Notice provides useful information and guidance to employers, employees, and payroll professionals, as well as welcome transitional relief. However, after careful review by APA members across the country, we have determined that there are areas of the Notice that need clarification, adjustment, and explanation.

Method of Reporting on the Form W-2

Q&A-2 provides that the purpose of the reporting is to provide useful and comparative consumer information to employees on the cost of their health coverage. Therefore, if there is an error in the amount reported in Box 12, Code DD, the employer should not have to file a Form W-2c, *Corrected Wage and Tax Statement*, with the Social Security Administration or any state reporting the corrected amount. The employer should at most be required to provide the employee with a corrected Form W-2 showing the corrected amount in Box 12, Code DD.

Q&A-6 provides that an employer may use any reasonable method of reporting the cost of coverage provided under a group health plan for an employee who terminates employment during the plan year, as long as it does so consistently for all employees. Examples 1 and 2 show that the employer may either report or not report the cost of COBRA coverage provided to the terminated employee. The IRS should clarify how this guidance applies when the employer pays for the employee's continuation coverage under a severance agreement.

Employers Subject to the Reporting Requirement

Q&A-3 provides that, in general, all employers that provide applicable employer-sponsored coverage under a group health plan are subject to the reporting requirement under §6051(a)(14). There are occasions where an employee who has terminated employment with Employer A elects COBRA continuation coverage under Employer A's group health plan and is then subsequently hired by Employer B. Employer B has a 90-day waiting period before the employee is eligible for coverage under its group health plan, so Employer B then agrees to pay the employee's COBRA premium under Employer A's group health plan until coverage under Employer B's plan is effectuated. In this situation, assuming that both Employer A and B opt to report COBRA coverage under Q&A-6, which employer is responsible for reporting on Form W-2 the cost of the employee's COBRA coverage?

Many employers use third-party sick pay providers to handle W-2's for short term and/or long term disability payments. However, there has been no guidance as to whether the health insurance reporting obligation extends beyond the "employer." This issue is further complicated by the election between the third-party insurance provider and the employer where the provider actually files the Forms W-2 under their EIN. Moreover, sick pay providers are not prepared from a systems standpoint to meet any W-2 health care reporting requirement, and are particularly disadvantaged by the fact that these providers generally do not have access to data regarding the various types of health coverage that the employer is providing to these employees. Therefore, at a minimum, we request that the transition relief be extended to include sick pay providers from having to comply with these provisions.

After the transitional relief period ends, the IRS should continue to exempt sick pay providers from this reporting requirement.

Former Employee Reporting

Q&A-9 provides that employers are not required to issue a Form W-2, including the aggregate reportable cost of employer-sponsored health insurance, to a former employee to whom the employer is not otherwise required to issue a Form W-2. The fact that a former employee is receiving some type of payment that constitutes wages (e.g. severance pay, nonqualified deferred compensation, group-term life insurance) should not trigger the new reporting requirement. The burdens involved with complying with this new requirement outweigh the benefit to these former employees of knowing the cost of the employer-provided health insurance, because this data is often not readily available to payroll departments and requires costly and time consuming system changes. At least during the transition period and optimally thereafter as well, employers should not have to report the cost of employer-sponsored health insurance to former employees who already receive a Form W-2.

What Is Applicable Employer-Sponsored Coverage

Q&A-12 provides that applicable employer-sponsored coverage means "coverage under any group health plan made available to the employee by an employer that is excludable from the employee's gross income under §106, or would be so excludable if it were employer-provided

coverage (within the meaning of §106)." Please explain the difference between coverage under a group health plan made available to an employee by an employer that is excludable from gross income under §106 and coverage that would be excludable from the employee's gross income if it were employer-provided coverage within the meaning of §106.

Q&A-12 also appears to conflict with Q&A-15 because Q&A-15 provides that the aggregate reportable cost includes any portion of the cost that is includible in an employee's gross income. The interplay between these two provisions should be clarified.

Q&A-12 also provides that coverage for an on-site medical clinic is applicable employer-sponsored coverage that must be reported, as an exception to the statement in A-12(2) that applicable employer-sponsored coverage does not include any coverage described in §9832(c)(1). The IRS needs to provide guidance to employers on how to calculate the cost of such on-site medical clinics attributable to individual employees. For example, whether the calculation will include the value to employees who actually used the on-site clinic versus the value of the clinic to all employees. Further complicating the issue is the fact that such clinics often treat employees for work-related injuries and illnesses, which are covered by workers' compensation insurance, the cost of which is not reportable on Form W-2 (see §9832(c)(1)(D)).

Q&A-12 also provides that applicable employer-sponsored coverage does not include any coverage described in §9832(c)(3) that is only for a specified disease or illness or hospital indemnity or other fixed indemnity if payment for the coverage is not excluded from gross income. Q&A's on the IRS website provide that such coverage is not reportable if the employee pays for it on an after-tax basis. Please clarify that such coverage is reportable if the employee pays for it on a pre-tax basis.

Also needing clarification is (1) whether the cost of group health coverage provided to 2% shareholders of an S corporation is applicable employer-sponsored group health coverage; (2) whether the cost of an employee assistance program (EAP) that is intended to help employees resolve personal problems that may adversely impact their work performance, conduct, health and well-being is applicable employer-sponsored group health coverage; (3) whether the cost of executive-level employee physicals is applicable employer-sponsored group health coverage; (4) whether the cost of new born daycare services, either provided in-house or through an outside agency, is applicable employer-sponsored group health coverage; (5) whether monies given to employees by employers to purchase individual health insurance plans is applicable employer-sponsored group health coverage; and (6) whether the cost of occasional medical procedures performed on-site, such as flu shots and the costs associated with administering the shots (e.g. doctors, nurses), is applicable employer-sponsored group health coverage.

Cost of Coverage Required to be Included in the Aggregate Reportable Cost

Q&A-17 provides that an employer that contributes to a multi-employer plan is not required to include the cost of coverage provided to an employee under that plan in determining the aggregate reportable cost. The IRS should clarify that union-sponsored health plans to which employers contribute qualify as multi-employer plans.

Q&A-18 provides that employers are not required to report the cost of coverage under a Health Reimbursement Arrangement (HRA). The IRS should state that employers may make a reasonable good faith effort to calculate a value and include the HRA cost in the total cost reported, if they so choose. The same option should be made available to employers after the transitional relief period ends.

Q&A-19, Example 1 is confusing. If the key point is that no portion of the health FSA amount is used in determining the aggregate reportable cost if none of the employer flex credit applies to the health FSA, then the example can be streamlined. Other examples should also be provided, such as (1) an example of a typical health FSA arrangement where no employer flex credits are provided and (2) an example in which salary reduction amounts in a health FSA are used to pay for benefits under separate dental and vision plans. The examples also should clarify whether the value of the health FSA is reduced by the employee's salary reduction election for all qualified benefits or the portion of the salary reduction that is specifically for the health FSA.

Q&A-20 provides transitional relief from the reporting requirement for dental and vision plans that are not integrated into a group health plan. It would be helpful if the IRS used the terminology from the Health Insurance Portability and Accountability Act for the definition of "excepted benefits." HIPAA provides a clear definition of what is not an "integral part" of a group health plan.

Q&A-21 requires that employers who provide coverage under a self-insured group health plan that is subject to federal continuation coverage requirements must report the cost of coverage on Form W-2. The IRS needs to provide clarity and guidance on how a self-insured employer can calculate the applicable cost of coverage and how the employer should report this information.

Section IV Transition Relief

Section IV provides that certain provision of the Notice offer transition relief from the reporting requirement, including Q&A-20, which offers relief from reporting the cost of dental and vision coverage provided under separate plans. However, the reporting requirement under IRC §6051(a)(14) refers to §4980(d)(1) in defining applicable employer-sponsored coverage, and §4980I(d)(1)(b)(ii) exempts separate dental and vision coverage from the definition of applicable employer-sponsored coverage. Therefore, the cost of such coverage should be permanently exempt from the reporting requirements under the law, not just on a temporary or transitional basis.

Thank you for the opportunity to comment on IRS Notice 2011-28. Please direct any comments, questions, or concerns to:

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