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ELECTION DAY SURPRISE: SKINNY PLANS WILL NEED TO FATTEN UP

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Early this morning, the IRS, in a coordinated effort with the DOL and HHS, issued guidance that basically said that so-called “skinny” plans won’t get employers out of the “play or pay” penalties. Limited grandfathering is available for so called “Pre-November 4, 2014” plans. All of this will be finalized in future regulations, but the guidance sets out what the agencies expect the regulations to say.

Skinny plans, for those unaware, were an attempt to circumvent the ACA rules requiring plans to provide minimum value. They cover preventive services, as required by the ACA, but exclude other substantial hospitalization and/or physician services. Some consultants had discovered that these plans technically satisfied the ACA’s minimum value standard even though they did not really comport with the spirit of the law. Skinny plans were not designed to provide health coverage; but rather; were intended as a way for employers to avoid completely the application of the play or pay taxes. By providing a plan that technically met minimum value, and making it affordable, an employer could make its employees ineligible for premium tax credits. By doing so, the employer would avoid the application of the play or pay penalties because one of the conditions to being hit with a penalty is that an employee obtain a premium tax credit.

The government intends to slam that door shut. The notice states that the agencies will amend the regulations to explicitly provide that plans that fail to provide substantial coverage for in-patient hospitalization services or physician services (or both) do not provide minimum value. Consequently, employees covered by those plans will be eligible for premium tax credits for coverage through the ACA exchanges/marketplaces beginning next year. It is anticipated that these changes to the regulations will be finalized in 2015 and will apply (other than Pre-November 4, 2014 plans) on the date they become final rather than being delayed until the end of 2015.

If you have already entered into a binding written commitment to offer one of these plans or have started enrolling your employees in these plans, as of this election day, then the agencies are expected to give you a pass on the play or pay penalties for 2015. In other words, just because your employees will be eligible for a premium tax credit for 2015 does not mean you will be hit with a penalty. However, to get this relief, your plan year must begin no later than March 1, 2015, so even if

you have a contract to offer these plans now, the government says you have to tear it up if your plan year starts after March 1, 2015.

Additionally, employers offering these plans must not state or imply that the plan precludes the employee from receiving a premium tax credit and has to correct timely any such disclosures that have previously been made.

While the guidance is not helpful for employers who went down this road, it's not surprising that the agencies closed this loophole. There was really not a reasonable expectation that these plans would survive; it was just a question of when the government would crack down. The timing of the guidance is interesting, from a political perspective. Given the agencies history in the 2012 election cycle, it seems likely this kind of guidance would normally have waited until after the polls were closed. Regardless of the politics, however, employers who were considering these arrangements now need to look elsewhere. Offering a "skinny" plan may still get you out of the larger play or pay penalty (what we call the "sledgehammer tax") of $2,000 per full-time employee for all full-time employees because the plan may still be treated as "minimum essential coverage." However, it now will not avoid the "tackhammer tax" based on this guidance, which is $3,000 per full-time employee *who receives a premium tax credit* because the skinny plan will no longer prevent an employee from receiving a premium tax credit.
