

Employee Benefits E-news

December 23, 2010

IRS Delays Effective Date of Non-Discrimination Rules for Insured Group Health Plans

The Patient Protection and Affordable Care Act ("Act") enacted on March 23, 2010 included a provision requiring insured group health plans (other than grandfathered health plans) to satisfy the nondiscrimination requirements of Internal Revenue Code ("Code") Section 105(h)(2). Prior to the Act, Code Section 105(h) only applied to self-insured health plans and required that they not discriminate in favor of highly compensated individuals as to eligibility to participate in the plan or in favor of highly compensated participants as to benefits available under the plan. The Act provided for the first time that insured group health plans comply with Code Section 105(h) under "rules similar to the rules" that applied to self-insured plans. In a Notice issued on December 22, 2010, the IRS has suspended application and enforcement of this rule for insured group health plans until regulatory guidance is issued.

Under the Act, an insured group health plan that failed to comply with the new nondiscrimination rules could have been subject to (1) an excise tax of \$100 for each day of noncompliance with respect to each individual to whom such noncompliance relates (with certain exceptions), (2) in the case of a non-Federal governmental group health plan, civil money penalties under the Public Health Services Act of up to \$100 per day per individual for each day the plan does not comply with the requirements (with certain exceptions), or (3) a civil action to enjoin a noncompliant act or practice or for other appropriate equitable relief under the Employee Retirement Income Security Act of 1974 ("ERISA").

In September 2010, the IRS requested public comments on guidance needed regarding the application of the nondiscrimination rules to insured group health plans. A number of commentators raised fundamental concerns about a plan sponsor's ability to comply with this new rule without regulatory guidance, including, in particular, guidance regarding what was meant by the phrase "[r]ules similar to the rules" that applied to self-insured plans and what rules might apply that are not similar to the rules that applied to self-insured plans.

After reviewing these comments, the Treasury Department and the IRS, as well as the Departments of Labor and Health and Human Services (collectively, the Departments) concluded that regulatory guidance is essential to an insured group health plan sponsor's ability to comply with the new nondiscrimination rules. Accordingly, the Departments have determined that an insured group health plan will not be required to comply with the nondiscrimination rules and no sanctions for noncompliance will apply until plan years after regulations or other administrative guidance of general applicability has been issued.

Thus, for the time being, employers sponsoring non-grandfathered insured group health plans do not have satisfy the nondiscrimination rules under Code Section 105(h). Self-insured group health plans must continue to satisfy Code Section 105(h). The Butzel Long Employee Benefits Practice Group will continue to monitor developments regarding these rules.

If you have any questions regarding the suspension of the nondiscrimination requirements for insured group health plans, please contact the author of this E-News Alert, your regular Butzel Long attorney or any member of the Employee Benefits Practice Group.

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