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INSURANCE BRIEF

Happy Fifth ACA Anniversary

The Patient Protections and Affordable Care Act (ACA) had its fifth anniversary on March 23rd. We saw a lot of changes early on and are now in the final stretch. There are still three provisions for which we are awaiting guidance. Nondiscrimination testing for fully-insured plans, auto-enrollment and the Cadillac Tax (see article on page 2). We hear informally from the DOL that developing the nondiscrimination rules is not a high priority and that they are unlikely to be issued in 2015.

The auto-enrollment provision did not include an effective date. The DOL originally stated it intended to issue rules in 2014. But, in 2012 they announced that the guidance would not be ready and that's the last we've heard!

Mandates: 2015 is the first year for employer reporting related to the individual and employer mandates. Employers should be deciding how to handle these reports now in order to ensure accurate and timely reports. If you have not yet discussed this with your SML Account team, expect to hear from them soon.

In the Polls: A new [Kaiser Family Foundation poll](#) shows the gap in favorable vs unfavorable views of the ACA has narrowed in recent months. With approval rates at their highest point in two years, 41 percent say they have a favorable view vs 43 percent who have an unfavorable view of the law. Despite recent publicity, the U.S. Supreme Court case concerning the legality of subsidies provided through the federal marketplace does not appear to be on the public's radar. The poll found that 53 percent have heard nothing about the case while 25 percent have heard only a little. However, 62 percent believe that the impact on the country will be negative if the court limits subsidies to state-run exchanges only. In that event, 65 percent believe Congress should pass a law allowing the availability of subsidies to continue in all states.

In the Court: Oral arguments were heard in the case of *King v. Burwell*. This case addresses the availability of a tax credit to subsidize the cost of health insurance coverage purchased through a federally-established Exchange. If the Supreme Court rules that tax credits are not available for coverage obtained through a federal Exchange it would impact insurers, employers and individuals alike. The pay or play penalty is only triggered if a full-time employee receives a subsidy. Individuals would lose their ability to access federal subsidies, and insurers would not receive those payments. We expect the Court will issue its written decision at the end of the current term in June.



HCSO Annual Reports

The 2014 [Annual Reporting Form](#) is now available online.

Deadline: April 30, 2015. Failure to meet the deadline can result in penalties of \$500 per quarter.

We recommend you review the [instructions](#) prior to beginning the form. You may also want to view the Annual Reporting Form [PDF preview](#).

As a reminder: you are not a "covered employer" under the HCSO and you should not submit the Form if (1) you are a private employer and you employed fewer than 20 persons, (including those employed outside of San Francisco) in each of the four calendar quarters of 2014; or (2) you are a non-profit corporation and you employed fewer than 50 persons (including those employed outside of San Francisco) in each of the four calendar quarters of 2013; or (3) if you did not have any employees in San Francisco in 2014. If you are not required to submit the Form, no further action is required.

2015 Expenditure Rates are \$1.65 for medium employers (20-99) and \$2.48 for large employers (100+).

If you have any questions please visit the Office of Labor Standards Enforcement's [HCSO website](#) to access the text of the HCSO, the implementing regulations, answers to "Frequently Asked Questions," and other helpful forms and notices. You can also contact the OLSE by phone at (415) 554-7892 or by email at hcsosf@sfgov.org.

Cadillac Tax Update

The IRS released [Notice 2015-16](#) at the end of February. The purpose is to begin developing regulatory guidance on the excise tax on high-cost health coverage which will become effective in 2018.

This can help many employers and plan sponsors as they now consider steps to mitigate possible exposure to the Excise Tax. This is especially true for employers contributing to multiemployer health plans who bargain benefit levels, as they may have only one more opportunity at the bargaining table to adjust benefits before the Excise Tax applies. This provision imposes a 40% nondeductible excise tax on the aggregate cost of applicable employer-sponsored coverage in excess of statutory limits.

The Notice focuses on three major issues affecting administration of the Excise Tax, namely: what types of coverage constitute "applicable employer-sponsored coverage" potentially subject to the Excise Tax; how the "cost" of applicable coverage is determined; and how the annual dollar limits are applied. Public comments on these issues are due by May 15, 2015.

Applicable Coverage: A fully-insured or self-insured employer plan to provide health care to the employees, former employees (COBRA and retiree), the employer, or their families. In addition to a medical policy, applicable coverage includes: Health FSAs, HSAs, on-site medical clinics providing more than de minimis medical care, multiemployer plans, specified disease or illness and hospital or fixed indemnity insurance paid pre-tax. Future guidance is expected to provide that executive physical programs and HRAs are also applicable coverage. The IRS is also considering excluding both stand alone dental and vision.

Cost of Applicable Coverage: The excise tax provision provides that the cost is generally determined under rules which apply for determining the COBRA applicable premium. The IRS is considering allowing employers to have just

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2015 PCORI Fees

The Patient Centered Outcomes and Research Institute (PCORI) fee, also known as the Comparative Effectiveness Research (CER) fee, is due annually using IRS form 720 by July 31st.

Background: This fee applies to both insured and self-insured medical plans. It is based on the number of covered lives—employees and dependents. For insured plans, the fee is paid by the carrier and included in premiums. For self-insured plans, the employer plan sponsor must calculate and pay the fee. The fee is based on the average number of covered lives for the 12-month policy period that ended in the preceding year.

Rates: For policies ending between January and October 31, 2014 the cost is \$2.00 per person. For policies ending between November 1—December 31, 2014, the cost is \$2.08 per person.

Counting Methods: There are three allowable counting methods for self-insured policies. Once chosen, the plan sponsor must use only the one method for that reporting year. Here are the options:

Actual Count Method. Plan sponsors calculate the sum of lives covered for each day of the plan year and then divide that sum by the number of days in the year. This count includes employees plus dependents.

Snapshot Method. Plan sponsors calculate the sum of the lives covered on one or more dates in each quarter of the plan year and then divide that number by the number of dates used. Each date must be within three days of the date used for the first quarter. E.g. If using February 15th (1st quarter), then must use a day between May 12 – 18th (2nd quarter). Under this method, the plan sponsor can count the number of covered employees and multiply that number by 2.35 to obtain the spouse and dependents count.

The 5500 Method. By adding the total number of employee lives on the first day of the plan year to the total number of lives on the last day of the plan year as reported on the Form 5500 (without dividing by 2). Can only use this method if the 5500 for that plan year is filed no later than the due date for the fee imposed for that plan year. E.g. Calendar plan year 2013, the 5500 is due by 7/31, and the employer obtains an automatic 2 ½ month extension. The employer is not eligible to use the Form 5500 method because they did not file by the 7/31 fee due date.

Health Reimbursement Account (HRA). In the event the employer has a self-funded medical plan and a HRA covering the same group, the fee will be payable on the self-funded medical plan. If the employer offers a self-funded medical plan to one class (e.g. management employees) and a self-funded HRA to non-management employees, then the fee would be based on the aggregate number of covered lives. If the employer has a fully-insured medical plan and a HRA covering the same group, the fee is payable on the HRA. Most HRA third-party administrators are able to provide the covered lives count required to make payment.

Retiree Coverage: The fee applies to health insurance policies and self-insured health plans that provide accident and health coverage to retirees, including retiree-only policies and plans.

COBRA continuation coverage: COBRA and similar continuation coverage (Cal-COBRA, for example) must be taken into account when determining the PCORI fee.

Please contact your SML Account Team if you have any questions.

Cadillac Tax *cont'd*

one cost of coverage for other than self-only coverage. This would be true even if the actual cost varies by the number of dependents. Under the COBRA regulations a self-insured plan has two methods for calculating premium—the actuarial basis and the past cost. The IRS is considering rules that would generally require a plan to use its chosen method for at least five years. This is to address concerns of possible abuse by a plan that switches methods frequently. Following are a number of other items addressed:

The Notice clarifies that the cost of applicable coverage refers to coverage in which an employee is *enrolled*, and not coverage that is merely *offered* to the employee.

The Notice confirms that any coverage under a multiemployer plan is treated as other-than-self-only coverage for purposes of the Excise Tax.

The Notice confirms that the cost of applicable coverage for health FSAs equals the sum of salary reduction contributions and also any reimbursements under the arrangement in excess of the salary reduction contributions, such as employer flex credits.

The IRS also indicated that a Health Reimbursement Arrangement (HRA) constitutes applicable coverage. The IRS is considering various methods of determining the cost of coverage for HRAs, including: (i) basing it on the amounts made newly available to a participant each year; (ii) adding together all claims and administrative expenses attributable to HRAs for a particular period and dividing that sum by the number of employees covered for that period; and (iii) using the actuarial basis method. Comments also were requested on issues relating to whether the cost of applicable coverage should not include (i) an HRA that can be used only to fund the employee contribution toward coverage, and/or (ii) an HRA that can be used to cover a range of benefits, some of which would not be applicable coverage.

- The IRS also invited comments on whether alternative methods for calculating the cost of applicable coverage would be consistent with the statute. This is in response to certain stakeholder suggestions that the cost of applicable coverage be determined by reference to similar coverage elsewhere (e.g., on the Health Insurance Marketplace).

Applicable Dollar Limit: The initial limits for 2018 are self-only coverage \$10,000 and other than self-only coverage \$27,500. The IRS addresses several related issues including:

- Acknowledging the potential for an employee simultaneously to have different types of coverage to which different dollar limits apply, the IRS is considering determining the applicable dollar limit based on whether an employee's primary coverage/major medical coverage (i.e., the type of coverage that accounts for the majority of the aggregate cost of applicable coverage) is self-only or other-than-self-only coverage. Alternatively, a composite dollar limit could be determined by prorating the dollar limits for each employee according to the ratio of the cost of the self-only coverage and the cost of the other-than-self-only coverage. The IRS invited comments on these approaches.
- Under the statute, the applicable dollar limits may be increased by an age and gender adjustment if the age and gender characteristics of a particular employer are less favorable than the national workforce. The IRS invited comments on whether it would be desirable or possible to develop safe harbors to assist employers in adjusting the dollar limits for their particular workforce.

The Notice does not provide further guidance on which party will be liable for the Excise Tax in the case of self-funded coverage – i.e., whether that is the plan sponsor, the third-party administrator, or the plan administrator listed on the plan's Form 5500. In addition, the Notice does not indicate whether there are any circumstances under which the Excise Tax may be paid from plan assets.

What's Next: The IRS will provide additional guidance and seek comments before publishing proposed rules.