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EBSA,

I will not repeat the background on the new PPACA affordability requirement, as I trust you can put my comments in context. I am commenting specifically on the safe harbor for determining affordability.

Your previous guidance indicated a safe harbor for the affordability standard involving use of a prior Form W-2 or an estimate of expected wages/salary. However, this design for the safe harbor misses the mark both for participating employees and for their employers. First, it really would not operate as a true safe harbor; there remains huge room for premium costs required from low paid workers that exceed the maximum of 9.5% of household income as Congress intended. Second, use of a prior year W-2 amounts or use of estimated amounts for new hires require a true up. Third, it will be difficult for employers to calculate and collect if there are additional premiums owed by the employee. And due to the high turnover in certain positions, it will be a challenge for employers to track down the workers to provide them with any resulting refunds. Finally, in the safe harbor as the agencies have currently proposed, the employees also may be required -- in any given pay period to pay more than 9.5% of income -- which can cause them a hardship (not to mention challenges in paying at least minimum wages), again not the intent of Congress.

A better approach is to allow a safe harbor for employers that allows the premium payments for the employee's share to be deducted from each pay check (from the gross figure, presumably) at a rate never to exceed 9.5%. The consensus among our clients of all sizes is that this solution is workable. It also received positive comments and nods from the other members at our fall 2011 Gulf Coast IRS Advisory Council Meeting when I raised the issue with Kevin Knopf via teleconference. I also have to believe it would be acceptable to employees at all pay levels; obviously, the employer will do a cut off so higher paid workers do not pay more in employee contributions than is required to provide the coverage.

Win-win.

To the extent compliance on issues like affordability is not simplified, the unintended consequence of the regulations will be more employers avoiding offering health coverage through other "planning opportunities" in the law, i.e., loopholes. With every unreasonable administrative burden, the tendency to pull back increases. Employers are not all threatening to do so, and many want to comply, they just feel it is too darn difficult and costly.

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