

Relaxed Guidance for Opt-out Payments, SCA Cash-in-Lieu Payments, and the Like

- A. The IRS Position. As discussed at prior seminars and in our e-Alerts, beginning in 2014 the regulators began to state that Section 125 Cafeteria Plan benefit dollars, payments to participants who opt-out of medical benefits, Service Contract Act and Davis-Bacon cash-in-lieu-of-fringe payments, cash options required under Union contracts, and similar types of payments create issues under the “affordability test” of the Affordable Care Act. The typical example provided by the regulators was as follows: An employer charges \$200 per month for its lowest cost self-only medical benefits coverage. The employer offers a \$100 opt-out bonus if the employee waives coverage (or simply pays the employee \$100 as cash-in-lieu of coverage). The employer is treated, for ACA affordability purposes, as “charging” the employee \$300 for its lowest cost self-only coverage. (The regulators’ rationale is that an employee wishing to enjoy coverage must pay \$200 plus “forego \$100” to have coverage, and therefore the coverage “costs” the employee \$300.)
- B. Response from the Commentators and the IRS Notice. As we also reported, numerous commentators challenged the regulators’ logic on this point and requested that they withdraw this position. (We learned, for example, that the AFL-CIO held an in-person meeting with the regulators formally requesting that they withdraw this position.) In December, the regulators issued Notice 2015-87 which, although it does not withdraw the position, provides additional time for employers to comply with it in some cases (and, perhaps, is intended to provide additional time for the regulators to consider withdrawing their position). The following are some of the most important points made in this extremely complex Notice:

-For plan years beginning before 2017 (as defined in the Notice), employer “benefit dollars” or “flex contributions” that can be used by Section 125 plan participants for health, other benefits or cash are not added to the stated cost of the employer’s lowest cost self-only health coverage for ACA affordability test purposes.

-Until future guidance, opt-out payments under existing opt-out arrangements (as defined in the Notice) are not added to the stated cost of the employer’s lowest cost self-only health coverage for ACA affordability test purposes.

-Until future guidance is issued, cash-in-lieu payments under the SCA or Davis-Bacon Act are not added to the stated cost of the employer’s lowest cost self-only health coverage for ACA affordability test purposes.

The regulators hinted in the Notice that they would consider further relief for opt-out payments that are “conditioned on the employee meeting certain conditions such as demonstrating that the employee has other coverage,” and hinted that they may consider further unspecified relief for SCA and Davis-Bacon employers. The Notice provides retroactive, limited and highly technical relief that at least will provide some breathing room to some employers who found themselves struggling to comply with the regulators’ position.

- C. Recommendations. Employers that currently utilize any of these features – or that are contemplating utilizing them – and that could face ACA affordability problems under the IRS world view should study the details of the temporary relief and monitor the expected future guidance.