



Early Renewal of Health Plans: Impact on COBRA, Cafeteria Plans, HRAs and Employer Benefit Offering Notices

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Date
September 2015

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Overview

From time to time, employers have changed the renewal date of their health insurance plan; often for business reasons such as aligning the renewal date with the employer's fiscal (tax) year or to correspond with their Code Section 125 cafeteria plan year. With the impending implementation of the Health Care Reform (aka Affordable Care Act (ACA)) provision to rate the health plan based on age-banding applicable to employers with between fifty (50) to ninety nine (99) employees as health plans renew on or after January 1, 2016, several insurance issuers and some employers are contemplating renewing the health insurance plan early – for example renewing the health plan on October 1 or December 1, 2015 rather than renewing at the normal date of January 1, 2016. This early renewal may carry a better premium rate (i.e., lower renewal rate based on non-age-banded rating) than if the plan is renewed at its normal time and would also mean delaying the implementation of the age-banded rating until the renewal in 2016. However, there is more to consider than just the renewal premium rate and delay of age-banded rating if the health plan is renewed early.

This whitepaper will discuss the impact that an early renewal of the health plan has on ACA compliance, COBRA, the employer's cafeteria plan, the employer's health reimbursement arrangement (HRA) and notices the employer is required to provide to employees about the benefits it offers so that all of the factors related to an early renewal of the health plan can be taken into consideration.

Impact on ACA Compliance

Applicable Large Employer Status

An employer that had 50 or more full time equivalent employees (FTEs) in the prior calendar year is an applicable large employer (ALE) and is subject to the employer shared responsibility provisions of the ACA, commonly known as the Play or Pay provisions¹.

As such, an ALE could pay a penalty for not offering its group health plan to enough of its full time employees and dependents or a penalty if the coverage offered is not of minimum value and affordable².

¹ IRS Notice 2012-58

² IRS Notice 2012-58

ALEs with 100 or more FTEs in 2014 become subject to the penalties as their health plans renew on or after January 1, 2015³.

Mid-size ALEs with between 50 – 99 FTEs in 2014 are not subject to the penalties until their health plans renew in 2016 if they can satisfy the criteria for the “transitional relief” granted by the IRS⁴. However, one of the criteria to postpone the penalty application until 2016 coverage is that the employer cannot have changed the benefits it was offering on February 9, 2014 such that a single health plan does not provide minimum value after the change⁵.

Consequently, if a mid-size ALE renews its health plan early to avoid the age-banded rating methodology and also changes the benefits of its health plan such that a single coverage plan no longer provides minimum value, that mid-size ALE will not be eligible to postpone the application of the Play or Pay penalties to 2016 and would be subject to potential penalties starting with when the plan first renewed in 2015, such as January 1, 2015⁶.

Conversely, if the mid-size ALE renews its health plan early and the employer can satisfy all of the criteria for the transitional relief, then the employer is not subject to the potential penalties until its health renews in 2016⁷.

Impact on COBRA

The COBRA Applicable Premium

The federal COBRA regulations stipulate that a qualified beneficiary (QB) can be charged up to 102% of the applicable premium for the health plan during the normal COBRA continuation period and as much as 150% of the applicable premium during the 11-month disability extension period⁸. For an insured health plan, the applicable premium is the premium charged by the insurer of the health plan for the same type of coverage for active employees (e.g., single or family coverage type, HMO, PPO or HDHP plan type, etc.)⁹.

³ IRS Notice 2013-45

⁴ IRS Notice 2013-45

⁵ IRS Notice 2013-45

⁶ IRS Notice 2013-45

⁷ IRS Notice 2013-45

⁸ ERISA §602(3); Code §4980B(f)(2)(C); PHS §2202(3)

⁹ *Draper v. Baker Hughes Inc.*, 892 F. Supp. 1287 (E.D. Cal. 1995)

The COBRA Determination Period

Further, the employer is required to determine the applicable premium, in advance, for a 12-month Determination Period during which the total premium charged to the QBs cannot change¹⁰, unless due to one of the recognized regulatory reasons:

- The employer was not charging the total amount allowed for the applicable premium (e.g., the employer was paying a portion of the total premium for the QB's coverage, such as a severance agreement, etc. or was not charging the full 102% or 150%)
- The QB changed plan types during the Determination Period, such as from single to family due to marriage or family to single due to death of a spouse.
- The employer changes insurers resulting in a change of coverage for active employees with a resultant change in the applicable premium for active employees (i.e., the "plan modification rule")¹¹.

Renewing the health plan early does not appear to allow the employer to change the premium owed by QBs due to that early renewal, unless the applicable premium is reduced or the early renewal is due to a change in insurers. If the early renewal results in a premium increase from the same insurer, it appears the QBs would continue to pay the existing COBRA premium and the employer would fund the difference in premium until the next Determination Period, at which time the QBs can be expected to pay the new premium for the next 12-month Determination Period.

However, this would consistently mean the premium period for the insurer and the Determination Period of the employer is out of phase.

Changing the Determination Period

The Determination Period established by the employer is expected to be a consistent 12-month period from year to year¹². Therefore, if the health plan renewal date is normally January 1st, then it is likely that the employer's 12-month Determination Period is a calendar year. The Determination Period can be changed, for legitimate business reasons, in advance¹³. But, once the Determination Period commences, the premium for QBs is to remain stable during that ensuing 12-month Determination Period.

¹⁰ ERISA §604(3); Code §4980B(f)(4)(C); PHS §2204(3); Treas. Reg. §54.4980B-8, Q/A-2(a)

¹¹ ERISA §602(1); Code §4980B(f)(2)(A); PHS §2202(1)

¹² Treas. Reg. §54.4980B-8, Q/A-2(a)

¹³ Treas. Reg. §54.4980B-8, Q/A-2(a)

If the health plan is renewed early (e.g., December 1 rather than January 1), the employer would likely want to change the 12-month Determination Period to match the new renewal date, going forward, so that QBs would experience new premium rates at the same time that the health plan renews. Assuming the employer normally had a January 1 renewal date (January 1, 2015) and did not know that they would be renewing the health plan early (December 1, 2015) when the plan was last renewed, the early renewal would occur during the current 12-month Determination Period.

In this example, if the employer wanted to change the Determination Period to match the future renewal date for the health plan, they would establish a short, 11-month Determination Period from January 1, 2016 to November 30, 2016, so that the next Determination Period would be a 12-month period from December 1, 2016 to November 30, 2017 with a consistent 12-month Determination Period thereafter.

Consequently, an early renewal of the employer's health plan impacts COBRA in terms of what the employer can technically charge the existing QBs for their continuation coverage until the next Determination Period and that if the employer wants to change the Determination Period it can be changed in advance of the next Determination Period by creating a short-Determination Period.

Since the Determination Period rules were written prior to the Affordable Care Act, the concept of early renewal could not have been contemplated. Employers that choose to change the premiums outside of the Determination Period due to early renewal should consider the existing guidance, risk tolerance and options carefully.

Impact on Cafeteria Plans

A Code Section 125 cafeteria plan is the employer's written plan document which is the sole mechanism of providing employees a choice between electing qualified non-taxable benefits or taxable compensation. As such, the plan document and corresponding summary plan description (SPD) for employees describe the benefits offered by the employer and communicate the rules by which the plan will operate to comply with the regulations. Changes to benefit plan offerings require prospective amendment of the plan document and SPD.

Amending the Cafeteria Plan to Reflect a Change in Health Plan Renewal Date

Under the regulations, the plan document and SPD provided to employees are required to communicate the qualified benefit plans the employer offers that the eligible employee can pay

premiums for pre-tax and the renewal date (coverage period) of each of those benefit plans (e.g., health plan, dental plan, vision plan, etc.)¹⁴.

Therefore, if the employer renews the health plan early, that renewal results in a change to the current renewal date displayed on the SPD to employees. To comply with the regulations, the employer should amend the cafeteria plan in advance of renewing the health plan to reflect the new renewal date of the health plan.

For example, if the current SPD lists the renewal date of the health plan as being 1/1 and the employer decides to renew the health plan early, on December 1, 2015, the employer should amend the cafeteria plan prior to December 1, 2015 to properly reflect that the health plan renews 12/1.

Effect on Cafeteria Plan 12-Month Plan Year

Under the regulations, a cafeteria plan has a 12-month plan year¹⁵. Unless the early renewal date of the health plan (e.g., December 1, 2015) corresponds with the employer's cafeteria plan year (12/1 – 11/30), the early renewal will take place mid-plan year. If the employer wants the cafeteria plan year and health plan renewal period to be the same 12-month period, going forward, the employer would need to amend the cafeteria plan year.

To change the plan year, prospectively, the employer would establish a "short plan year" at the next cafeteria plan renewal¹⁶. For example, assume the current cafeteria plan year is January 1, 2015 through December 31, 2015; the employer renews the health plan early, on December 1, 2015 and wants the future cafeteria plan year to be December through November. First, the employer would need to amend the renewal date of the health plan, in the current cafeteria plan year, to reflect the 12/1 renewal date prior to December 1, 2015, as noted above. Then, the employer would amend the cafeteria plan year when it renews on January 1, 2016 to have a short plan year ending on November 30, 2016 so that the cafeteria plan renews on December 1, 2016 for the expected 12-month plan year to run from 12/1 through 11/30 in the future.

Effect on Health FSA Election

Employees who make pre-tax elections to participate in a health FSA often make their elections taking into account the coverage provided by the employer's health plan, such as the deductible or co-insurance amounts that result in out-of-pocket expenses the employee can be reimbursed for from the health FSA.

¹⁴ § 1.125-1(c)(1)(i)

¹⁵ § 1.125-1(d)(1)

¹⁶ § 1.125-1(d)(2) & (3)

These employees are allowed to change their elections, mid-plan year, due to certain permitted election change events recognized in the regulations¹⁷. However, the regulations specifically prohibit an employee from changing their health FSA election due to a cost or coverage change¹⁸.

Therefore, if an employer renews the health plan early resulting in plan design changes and new or different out-of-pocket expenses (e.g., increase in deductible, etc.) and that renewal is mid-cafeteria plan year, the employees cannot change their health FSA elections to reflect those new out-of-pocket expenses.

Impact on HRAs

Many employers that provide a health reimbursement arrangement (HRA) integrate the HRA with the employer's group health plan to reimburse specific out-of-pocket eligible expenses incurred under the health plan. Consequently, the HRA is designed to match the health plan design. The HRA plan year is also set to match the out-of-pocket plan year of the integrated health plan (e.g., if the health plan deductible year is a calendar year, the HRA plan year is calendar year).

Therefore, if the employer renews the health plan early, the HRA would need to be amended to match any new plan design resulting from the early renewal, including changes to the deductible, co-insurance, etc. and/or the period that the insurer uses to credit eligible expenses against the health plan's out-of-pocket amounts (e.g., if the deductible year changes from January through December to December through November, etc.) Unless the HRA is amended to match the health plan, there will be confusion for participants due to claims under the HRA not processing against the new design for the health plan.

Impact on Employer Benefit Offering Notices

As noted in the section related to the employer's cafeteria plan, the cafeteria plan minimally needs to be amended to reflect the new renewal date of the health plan when the health plan is renewed early. If the employer also changes the plan year of the cafeteria plan to coincide with the health plan renewal, the cafeteria plan would need to be amended to reflect the new plan year, going forward. Either or both of these amendments need to be made in advance of the early renewal of the health plan and renewal of the cafeteria plan.

If the employer is subject to ERISA, the employer is required to have a plan document and SPD for the health and welfare plans it offers. By renewing the health plan early, the employer may need to amend its ERISA health plan document and SPD.

¹⁷ § 1.125-4

¹⁸ § 1.125-4(f)

Health Care Reform requires the employer to provide a Summary of Benefits and Coverage (SBC) for its non-excepted group health plans, which would include the group health plan and HRA¹⁹. The SBC is to be delivered no less than 60 days prior to any change in the coverage of the plan²⁰. Among other things, the SBC would include the coverage period (the period during which deductibles, co-insurance, etc. apply) and what the specifics of the plan are related to total deductible, etc. By renewing the health plan early, it is likely that the employer would need to distribute new SBCs to its employees for the health plan and HRA.

¹⁹ PHSA § 2715(a), as added by PPACA, Pub. L. No. 111-148

²⁰ Treas. Reg. § 54.9815-2715(b); DOL Reg. § 2590.715-2715(b); HHS Reg. § 147.200(b)



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