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The Affordable Care Act—Countdown to Compliance for Employers, Week 50: Wellness Programs, Affordability, and Premium Tax Credits

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The Affordable Care Act imposes a series of interrelated requirements on individuals, employers and providers. Individuals must maintain coverage or face the prospect of a tax penalty; carriers must offer and renew coverage. Low- and moderate-income individuals may qualify for premium subsidies to help pay for coverage; but their eligibility for subsidies is affected by the cost and relative generosity of any employer-provided group health coverage otherwise available to them.

"Large" employers (i.e., those with 50 or more full-time and full-time equivalent employees) may face penalties under the Act's rules governing "employer shared responsibility" for failing to offer coverage to their full-time employees. They can, however, reduce or eliminate their exposure to those penalties by offering coverage that is both affordable and sufficiently generous. (For a discussion of rules governing large employers, please see our **January 16, 2013 client advisory**.)

The Act separately seeks to encourage wellness programs by expanding the exception for wellness programs originally provided for in regulations issued in 2006 under the Health Insurance Portability and Accountability Act (HIPAA). **Final three-agency regulations** published June 3, 2013, prescribe rules governing the design and operation of wellness programs that offer some sort of reward (e.g., a premium discount) for healthy behavior. In a **proposed rule** published May 3, 2013, the Treasury Department/IRS issued rules governing, among other things, the impact of wellness programs on group health plan affordability. (We explained those rules in our **May 16, 2013 client advisory**.)

The regulators previously determined (Treas. Reg. §§ 1.36B(c)(3)(v)(A)(1) and (2) to be exact) that group health plan affordability under the Act's employer shared responsibility rules must in all cases be calculated based on the cost of self-only coverage. The guidance cited above dealing with the impact of wellness programs on group health plan affordability addressed another equally important question, i.e., what premium cost must an employer use to determine whether coverage is affordable? Is it the stated employee premium? Or is it the stated premium cost reduced by the amount of the wellness reward? The answer to this question was much anticipated: from an employer's perspective, taking a wellness discount into account would mean that it would be marginally cheaper for an employer to offer affordable coverage. This means, of course, that the employer could make an offer of affordable coverage—and therefore avoid an excise tax penalty—for less money than it would cost them if they could not take the discount into account. This is not where the regulators landed, at least not entirely.

Under the May 3 proposed regulations, for 2014, affordability is generally determined by assuming that each employee *fails* to satisfy the requirements of a wellness program. This rule applies as well in 2015 and later years, except that affordability is determined by assuming that each employee qualifies for any applicable non-smoker discount.

For example, an employer's workforce includes employees, A, B and C, whose annual W-2 wages are $15,000, $20,000, and $30,000. Assume that the employee premium for self-only coverage is $237.50 per month and the total monthly premium for self-only coverage is $550. Assume further that the employer offers a premium discount of $75 per month for general wellness and $125 per month for smoking cessation. On these facts, ignoring any wellness adjustments and assuming that the employer avails itself of the W-2 safe harbor for affordability determinations, the employer's coverage for Employees A, B and C, would be affordable if the monthly premiums were $118.75 ($15,000 x 9.5% ÷

12), $158.33 ($20,000 x 9.5% ÷ 12), and $237.50 ($30,000 x 9.5% ÷ 12), respectively. Here's how affordability breaks down, with and without wellness discounts.

	Emplo
(1) Employee premium (undiscounted for wellness)	$237.50 **Not Affordable** ($118.75 would be affordable)
(2) Employee premium (discounted for wellness—30%)	$162.50 with discount $237.50 without discount **Not Affordable if discount is ignor** ($118.75 would be affordable)
(3) Employee premium (discounted for non-smoker status—50%)	$112.50 with discount $237.50 without discount **Affordable in 2015 and later years**

Under the general rule, i.e., that affordability is determined by assuming that each employee fails to satisfy the requirements of a wellness program, the coverage in this case is unaffordable for both Employee A and B. So the employer faces a potential excise tax penalty in 2015 and later years if either of these employees qualifies for a premium subsidy (assuming that neither employee qualifies for the non-smoker status discount). In 2014, there is no employer shared responsibility penalty, so the employer does not care. The employee might well care in 2014, however, because whether he or she can qualify for a premium subsidy still hinges on whether the employer coverage that he or she is offered is affordable. If there were a penalty in 2014 (which there would have been but for the one-year delay—explained in our July 10, 2013 client advisory), then the employer would have to "buy-up" in the amount of $103.82 in the case of Employee A and $79.17 for Employee B to make the coverage affordable. If, on the other hand, the employer could assume that each employee satisfied the requirements of a wellness program, then the buy-up would be $47.50 for Employee A and $7.92 for Employee B.

Authors