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# The Affordable Care Act—Countdown to Compliance for Employers, Week 7: IRS Puts the Kibosh on Health Plans that Fail to Cover Hospital or Physician Services

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In a **previous post**, we described an Affordable Care Act compliance strategy—referred to commercially as a "minimum value plan" or "MVP"—that involves an offer of group health plan coverage that, while similar in most respects to traditional major medical coverage, carves out inpatient hospital services. A subsequent post warned of rumors that regulators were less than thrilled with these arrangements, and that in all likelihood the Treasury Department/IRS and the Department of Health and Human Services (the "Departments") would take steps to require that plans purporting to provide minimum value cover such services.

On November 3, 2014, the Departments **announced** their intent to retroactively revise their respective minimum value regulations so that plans that fail to provide substantial coverage for in-patient hospitalization services (or for physician services) will not qualify as minimum value. The Departments' announcement also included some limited transition relief, and imposed some additional notice requirements.

## Background

An employer may be liable for an "assessable payment" under the Affordable Care Act's employer shared responsibility (pay-or-play) rules if one or more of its full-time employees receives a premium tax credit from a public exchange or marketplace. An employee (or family member) who is offered coverage under an eligible employer-sponsored plan that offers affordable coverage providing "minimum value," however, is barred from receiving a tax credit.

MVPs were intended to facilitate compliance by employers by lowering the cost of affordable, minimum value coverage. The plans hold down costs by carving out in-patient hospitalization services or, in some cases, physician services, while at the same time providing minimum value. By offering affordable MVP coverage to substantially all their full-time employees, an employer would avoid penalties under the ACA's employer shared responsibility rules.

### *The Actuarial Assumptions underlying "minimum value"*

In general, a plan provides minimum value if the plan's "share of the total allowed costs of benefits provided under the plan is at least 60 percent of the total allowable cost of benefits"— defined in regulations published by the U.S. Department of Health and Human Services as:

1. The anticipated covered medical spending for a bundle of services referred to as "essential health benefits" (EHBs);
2. Computed in accordance with the plan's cost-sharing, and
3. Divided by the total anticipated allowed charges for EHB coverage provided to a standard population.

While EHBs include in-patient hospital services and physician services, self-funded and large fully-insured employer-sponsored group health plans are not required to offer EHBs and thus are not required to provide these services. The regulators worried, however, about the reference in the ACA to coverage offered to a "standard population." In this context, the standard population that Congress had in mind includes and is generally limited to large employer plans. According to the Departments:

> "A plan that fails to provide substantial coverage for these services would fail to offer fundamental benefits that are nearly universally covered, and historically have been considered integral to coverage, under typical employer-sponsored group health plans."

In May 2013, the IRS published a proposed regulation that looked to the HHS standards to determine minimum value. According to the IRS, if a plan provided minimum value for HHS's purposes (principally to determine whether individuals were eligible for a premium tax credit), then the plan was also deemed to provide minimum value for purposes of determining assessable payments under the employer shared responsibility rules. Under the HHS final regulations and the IRS's proposed rule, plans can determine minimum value by, among other approaches, using an **on-line calculator** designed and made available by HHS.

It did not take long for sponsors and promoters of MVP arrangements to discover that a group health plan could, if properly designed, return a value of 60% from the online calculator even if the plan did not cover inpatient hospital services or physician services. This design proved particularly attractive since exclusion of inpatient hospital services or physician services reduced the premiums for MVP coverage to less than half of the cost of traditional major medical coverage, making it much easier for employers to offer MVP coverage on an affordable basis.

***The Problem with the Calculator***

Notice 2014-69 states flatly that plans that fail to provide substantial coverage for in-patient hospitalization services should not be permitted to satisfy the requirements for providing minimum value. In so holding, the notice concedes that that there may be a problem under the hood of the online calculator. According to the notice:

> "Concerns have been raised as to whether the continuance tables underlying the MV Calculator (and thus the MV Calculator) produce valid actuarial results for unconventional plan designs that exclude substantial coverage for in-patient hospitalization services. These concerns include that the standard population and other underlying assumptions used in developing the MV Calculator and associated continuance tables are based on typical self-insured employer-sponsored plans, essentially all of which historically have included coverage for these services, and that designing a plan to exclude such coverage could substantially affect the composition of the population covered by discouraging enrollment by employees who have, or anticipate that they might have, significant health issues. It has been suggested that these and other effects resulting from excluding substantial coverage of in-patient hospitalization services may not be adequately taken into account by the MV Calculator and its underlying continuance tables. Similar concerns have been raised regarding the possibility of using the MV calculator to demonstrate that an unconventional plan design that excludes substantial coverage of physician services provides minimum value."

In plain English, government actuaries have a lot of work ahead of them to figure out exactly how the online calculator should be reconfigured to produce the intended policy result of requiring hospital and physician coverage, and what the scope of that coverage should be.

**Treatment of MVP Arrangements in 2015 and Later Years**

In Notice 2014-69, the Departments announced their intent to revise their respective minimum value regulations so that plans that fail to provide substantial coverage for in-patient hospitalization services or for physician services will not qualify as minimum value. The Departments anticipate that these changes will be finalized in 2015 and will generally apply beginning in 2015, with one important exception.

***Transition Relief***

Recognizing that many employers have either already adopted or have gone a long way toward adopting MVP-type arrangements, the notice provides a welcome transition rule under which a plan that is adopted before November 4, 2014 and that has a plan year beginning no later than March 1, 2015 will not be subject to the new rules until the following plan year. This transition rule applies to an employer that has either "entered into a binding written commitment to adopt, or has begun enrolling employees in, [an MVP arrangement] prior to November 4, 2014 based on the employer's reliance on the results of use of the MV Calculator."

Employers that have at least some written evidence, prior to November 4, 2014 of a binding commitment to adopt an MVP plan should qualify for relief. With respect to starting enrollment, circulation of enrollment materials clearly qualifies. Arguably, notifying employees that the enrollment will commence at some time in the near future also should qualify. Employers unsure of whether they have taken sufficient steps prior to November 4, 2014 to qualify for relief should consult their insurance advisors or legal counsel.

***Employer Duty to Inform Employees***

Irrespective of whether an MVP arrangement qualifies for transition relief, the Departments have determined that employees covered under MVP arrangements will retain their eligibility for premium tax credits even though the employer is protected from assessable payments. Notice 2014-69 imposes on employers that offer coverage under MVP arrangements the obligation to refrain from making certain representations and to make certain affirmative disclosures. Specifically, the employer—

- Must not state or imply in any disclosure that the offer of coverage under the MVP arrangement precludes an employee from obtaining a premium tax credit, if otherwise eligible; and
- Must timely correct any prior disclosures that stated or implied that the offer of the MVP arrangement would preclude an otherwise tax-credit-eligible employee from obtaining a premium tax credit.

The notice further clarifies that if an employer also offers an employee another plan that is not an MVP arrangement and that is affordable and provides minimum value, the employer is permitted to advise the employee that the offer of this other plan will or may preclude the employee from obtaining a premium tax credit.

**Closing Thoughts**

Notice 2014-69 appears to impose a benefit mandate—i.e., to cover inpatient hospital services and physician services—on self-funded and large fully-insured group health plans. The Departments might claim that this is not a benefit requirement, since no plan is required to include inpatient hospital services and physician services. It is rather a predicate for minimum value status. This can only be true, however, if there is a problem under the hood of the calculator. *Is it really possible for a plan that fails to cover inpatient hospital services and physician services to deliver a minimum value of 60% or greater*? If the answer is yes, then it should not be possible for the Departments to deliver on their promise. While the notice does not say so explicitly, one suspects that they have already determined that an MVP plan cannot get to 60% minimum value.

## Authors