

December 21, 2015

IRS Adjustments to the 9.5% Affordability Standard as Applied To the Employer Safe Harbors and to the \$2,000 and \$3,000 Employer Mandate Excise Tax Amounts

Last week the federal agencies charged with implementing the Affordable Care Act (ACA) issued, through the auspices of the IRS and U.S. Treasury Department, IRS Notice 2015-87. The Notice provides further guidance on the application of various provisions of the ACA to employer-provided health coverage. Notice 2015-87 is organized into six different parts each providing specific guidance on various group health plan topics. This guidance will take some unpacking and I will provide summaries of select portions in separate written installments; some will be more extensive than others.

Today's installment focuses on a segment of Part III of the Notice addressing cost adjustments to the employer mandate provisions of the ACA. These adjustments will impact applicable large employers immediately, depending on their particular circumstances.

ADJUSTMENT OF THE 9.5% STANDARD FOR PURPOSES OF THE EMPLOYER AFFORDABILITY SAFE HARBORS FOR 2015 AND 2016

In Notice 2015-87:

- the IRS acknowledges that the 9.5 percent standard set forth in each of the three affordability safe harbors in the employer mandate regulation is derived from the 9.5% statutory standard for determining affordability for advance premium tax credit (APTC) by Marketplaces using the applicable taxpayer's household income
- Treasury and IRS announce their intention to amend the employer mandate regulation under section 4980H so that the 9.5% standard and any annual adjustments are consistent between the affordability safe harbors used by employers and the statutory standard used by the Marketplaces
- **Accordingly, employers may use the following percentages when applying the affordability safe harbors:**
 - **9.56 percent for plan years beginning in 2015 and**
 - **9.66 percent for plan years beginning in 2016.**

Example: The safe harbor affordability standard for a group health plan with July 1 plan year, would be 9.5% for January 2015 through June 2015, 9.56% for July 2015 through June 2016 and 9.66% for July 2016 through June 2017.

Why is this important? Prior to Notice 2015-87 there was a bit of a discrepancy related to the 9.5% affordability standard. The W-2 safe harbor, rate of pay safe harbor and federal

poverty line safe harbor were all established by the employer mandate regulation, finalized in February 2014, and were not statutory provisions. While all three of the safe harbors applied the 9.5% affordability standard, the regulation did not provide for annual indexing of the 9.5% safe harbor standard for cost increases over time.

In contrast, the 9.5% standard used by the Marketplaces when determining affordability based on household income for APTC purposes is subject to annual indexing for cost increases as set forth in the ACA statute.

This discrepancy resulted in Marketplaces using a 9.56% affordability standard and employers using a 9.5% safe harbor standard. This gap, while currently small, would obviously grow over time if not addressed.

ADJUSTMENT OF THE \$2,000 A-TAX AND \$3,000 B-TAX PENALTY AMOUNTS FOR CALENDAR YEARS 2015 AND 2016

Under the statutory employer mandate provisions of the ACA, the \$2,000 and \$3,000 excise tax penalties under sections 4980H(a) (the A-Tax penalty) and 4980H(b) (the B-Tax penalty) apply on a calendar year basis and are assessed monthly. These penalty amounts were originally set to apply beginning in calendar year 2014, but the penalty amounts (and the section 6055 and 6056 employer reporting requirements) were delayed for one year – until calendar year 2015.

Section 4980H(c) provides that in the case of any calendar year after 2014, the applicable dollar amounts of \$2,000 and \$3,000 are subject to increase based on an indexing formula. Notice 2015-87 announces the adjusted penalty amounts for calendar years 2015 and 2016 as follows:

- **For calendar year 2015, the adjusted \$2,000 amount is \$2,080 (\$173/mo.), and the adjusted \$3,000 amount is \$3,120 (\$260/mo.)**
- **For calendar year 2016, the adjusted \$2,000 amount is \$2,160 (\$180/mo.), and the adjusted \$3,000 amount is \$3,240 (\$270/mo.)**

Treasury and the IRS anticipate that adjustments for future years will be posted on the IRS.gov website.

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Please contact me if you have any questions.

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