



Legal Alert: IRS Delays Nondiscrimination Requirements

12/30/2010

Under the Patient Protection and Affordable Care Act (the "Act"), insured group health plans were to be subject to nondiscrimination requirements, effective with their first plan year beginning after September 23, 2010, *i.e.*, January 1, 2011 for calendar-year plans. On December 22, 2010, however, the Internal Revenue Service issued Notice 2011-1, stating that insured plans will **not** have to comply with the new nondiscrimination requirements until further guidance is issued. According to the IRS, comments that were received regarding the applicability of requirements "similar to" portions of Section 105(h) of the Internal Revenue Code to insured plans led the three agencies responsible for implementing the Act – the Departments of Treasury, Labor and Health and Human Services – to decide to delay enforcement of the nondiscrimination provisions until additional regulatory guidance can be issued.

The IRS also noted that there were fundamental concerns about plan sponsors' ability to comply with the new law without further guidance, and requested that further public comments on a number of areas of concern be submitted by March 11, 2011. Specifically, the IRS asked for comments about thirteen concerns that additional guidance should address, including the following:

- on what basis should a determination be made that a plan provides nondiscriminatory benefits, as well as what constitutes "benefits";
- how should the new rules apply to insured group health plans beginning in 2014 when health insurance exchanges become operational under the Act, and various other provisions (e.g., employer and individual responsibility provisions) take effect;
- should an alternative method of compliance, that would require only a coverage test, be available;
- should use of a "nondiscriminatory classification" provision be allowed, and should a definition of "highly compensated employee" from Code Section 414(q) be allowed to be used for those purposes;
- should employers be permitted to aggregate "substantially similar" coverage options for purposes of nondiscrimination testing and, if so, on what basis should a "substantially similar" determination be made; and
- how should the nondiscrimination standards be applied to separate plans

that are maintained in distinct geographic locations.

If you have any questions about the effective date or any other aspects of the new nondiscrimination tests, please contact one of the members of the Employee Benefits Group or the author of this Legal Alert, Jeffrey Ashendorf, at jashendorf@fordharrison.com.