



## Legal Alert: IRS Issues Interim Guidance on Health Plan Cost Reporting Requirement

1/11/2012

**Executive Summary:** The IRS has issued Notice 2012-9, which restates and amends its previously issued interim guidance (Notice 2011-28) on the requirement that employers report information regarding the cost of employer-sponsored group health plan coverage.

The Patient Protection and Affordable Care Act of 2010 ("PPACA") added Section 6051(a)(14) to the Internal Revenue Code of 1986, as amended (the "Code"), requiring that the aggregate cost incurred by an employer for employer-sponsored health coverage provided to an employee be reported on the employee's Form W-2, for informational purposes, for taxable years beginning on or after January 1, 2011.[1]

On January 3, 2012, the IRS issued Notice 2012-9, amending its previously issued guidance on informational reporting (Notice 2011-28) and adding additional provisions.

Notice 2012-9 clarifies that:

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In the case of the 2012 Forms W-2 (*i.e.*, to be filed in early 2013), and Forms W-2 for later years unless and until further guidance is issued, an employer is not subject to the reporting requirement for any calendar year unless it was required to file 250 or more Forms W-2 for the preceding calendar year;

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An employer is not required to include the cost of coverage under a dental plan or a vision plan if the dental or vision plan qualifies as "excepted benefits" for purposes of HIPAA under Treasury Regulation §4.9831-1(b)(3). (Generally, either (1) the dental or vision benefits must be offered under a separate policy, certificate, or contract of insurance (that is, not offered under the same policy, certificate, or contract of insurance under which major medical or other health benefits are offered) or (2) participants must have the right not to elect the dental or vision benefits and if they do elect the dental or vision benefits they must pay an additional premium or contribution for that coverage.);

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An employer is not required to report the cost of coverage provided under a self-insured group health plan that is not subject to any federal continuation coverage requirements, including under COBRA, ERISA, the Public Health

Service Act or the temporary continuation coverage requirement under the Federal Employees Health Benefits Program.

Notice 2012-9 also addresses several new issues, including:

- The reported amount is required to include the cost of coverage provided under an employee assistance program (EAP) or wellness program, or by an on-site medical clinic, only to the extent that the coverage is provided under a program that is a "group health plan." However, an employer is not required to include the cost of such coverage, even if it otherwise would be required to be included because it constitutes applicable employer-sponsored coverage, if the employer does not charge a premium for continuation of that coverage provided to a beneficiary in accordance with any applicable federal continuation coverage requirements (such as a COBRA beneficiary);
- Employers may, but are not required to, include in the reported amount the cost of coverage that is not required to be included under applicable interim relief, such as the cost of coverage under a Health Reimbursement Account (HRA), a multi-employer plan, an EAP, a wellness program or an on-site medical clinic;
- The cost of coverage provided under hospital indemnity or other fixed-amount indemnity insurance, or the cost of coverage only for a specified disease or illness, must be included if the employer makes any contribution to the cost of coverage that is excludable under § 106 of the Code or if the employee contributes towards the cost of the policy on a pre-tax basis under a § 125 cafeteria plan. However, to the extent that the employer merely provides the opportunity for employees to purchase an independent, noncoordinated fixed indemnity policy and the employee pays the full amount of the premium with after-tax dollars, the cost of coverage provided under that policy is not required to be reported by the employer on Form W-2.

The new guidance reiterates that employers are not required to report the amount of a health FSA offered through a § 125 cafeteria plan if contributions occur only through employee salary reduction elections, and provides a new example illustrating this provision.

Notice 2012-9 also provides that, until further guidance is issued, the reporting requirement will not apply to tribally chartered corporations wholly owned by federally recognized Indian tribal governments. Additionally, it clarifies the application of the reporting requirement to certain related employers not using a common paymaster.

Notice 2012-9 is applicable to 2012 Forms W-2 (that is, forms required for calendar year 2012, which will be filed in early 2013). Employers may also rely on the guidance provided in Notice 2012-9 if they voluntarily report the cost of coverage on 2011 Forms W-2 (filed this month), even though such reporting is not required for 2011.

According to the Notice, the transition relief it provides will be available at least for 2012 Forms W-2 and will not be affected by the issuance of further

guidance. Any future guidance that limits the availability of transition relief provided by Notice 2012-9 will be prospective only and will not be applicable earlier than January 1 of the calendar year beginning at least six months after the date of issuance of the guidance.

If you have any questions regarding this Notice or about the Act's reporting requirements, please contact any member of Ford & Harrison's Employee Benefits practice group or the Ford & Harrison attorney with whom you usually work.

You may also visit the health care reform section of the Ford & Harrison website, <http://www.fordharrison.com/HealthcareReform.aspx>, for more helpful resources and tools on health care reform.

[1] Under Notice 2010-69, reporting was made optional for the 2011 calendar year. For more information on that Notice, please see our October 18, 2010 Legal Alert, *Do Employers Need to Report the Amounts that They Pay for Employees' Health Insurance?*, available at: <http://www.fordharrison.com/shownews.aspx?Show=6690>.