McKenna Long & Aldridge LLP
Attorneys at Law

Employee Benefits Advisory

September 8, 2010

Health Care Reform Could Impact Your Employment and Severance Agreements

This is the seventh in a series of alerts intended to help guide employers and plan sponsors through their new obligations under the recently-enacted health care reform laws and related guidance.

Many employment and severance/separation agreements provide that the company will pay all or a portion of health care premiums (including COBRA premiums) for a former or current executive that is more favorable than the level provided to other employees. If your agreements make this promise, this could be dangerous.

Self-Insured Plans. For self-insured health plans, the long-standing rule is that these company premium payments must be taxed to the executive on IRS Form W-2, or else the executive will be taxed on the full value of medical benefits he or she receives (this could be huge if the executive or a covered dependent is or becomes ill).

Fully-Insured Plans. Fully-insured health plans were historically not subject to this same rule. However, starting with plan years beginning on or after September 23, 2010, a similar (not the same) rule will apply to fully-insured plans. If your company pays all or a portion of an executive's non-COBRA premium payments, your company may be penalized $100 per day per executive who receives these premium payments (with a maximum penalty for an unintentional failure of $500,000 per taxable year). That's $36,500 per year in penalties that your company will owe the IRS for each executive. At this point, it is somewhat unclear whether the executive would also incur taxes, but it does not appear that such taxation is likely. A limited exception exists for certain companies employing 50 or less employees. In addition, in the limited situation where you provide company-paid COBRA premiums, it still appears possible for your company to avoid the $100 per day penalty, but only if you structure the payment as a taxable reimbursement (not a direct payment).

If your company pays a greater portion of health care premiums for current or former executives, you may need to restructure these types of arrangements, which likely includes amending existing

CONTACTS

If you have questions or need assistance complying with these requirements, please contact any of the McKenna Long & Aldridge LLP attorneys or public policy advisors with whom you regularly work. You may also contact:

Ann Murray
404.527.4940

Sam Choy
404.527.8561

Leah Singleton
404.527.4649

Stacey Stewart
404.527.8383

Suzannah Gill
404.527.4921

employment or severance agreements before the new rules go into effect. We have developed some alternative approaches that may help a company provide more favorable health benefits without incurring penalties or taxation of benefits. Let us know how we can help.

For purposes of this alert, an executive includes any individual who is one of the five highest paid officers, a 10% or more shareholder, or among the highest paid 25% of employees. Certain exceptions may apply. In addition, certain limited grandfathering exceptions may be available under health care reform.

To view previous alerts from this series, please click on the following links:

Health Care Reform - What Does it Mean to Employers?

Health Care Reform: Can You Continue to Limit Coverage for Pre-Existing Conditions?

Guidance Issued For "Grandfathered Plan Status" Under The Health Care Reform Act

Reimbursement Application Released For Early Retiree Reinsurance Program

Guidance Issued Regarding Coverage of Preventative Services Under Health Care Reform

Guidance Issued Regarding Internal Claims, Appeals, and External Review Processes

With a team of attorneys who are highly experienced in the employee benefits field, MLA can provide answers to questions and assistance in complying with these requirements.

About McKenna Long & Aldridge LLP

McKenna Long & Aldridge LLP is an international law firm with 475 attorneys and public policy advisors. The firm provides business solutions in the areas of complex litigation, corporate, environmental, energy, and climate change, finance, government contracts, health care, intellectual property and technology, international law, public policy and regulatory affairs, and real estate. To learn more about the firm and its services, log on to http://www.mckennalong.com.

Subscription Info

If you would like to be added or removed from this mailing list, please email information@mckennalong.com.