Spousal Exclusions and Surcharges – Considerations and Caveats

*A **Compliance Corner** White Paper*

Employers have considered eliminating coverage for spouses or restricting eligibility to spouses who don't have coverage available through their own employer over the years. **The Affordable Care Act (ACA) has generated new – and fevered – interest in restrictions on spousal coverage.**

Employers who meet the definition of applicable large employer (ALE) under the ACA are required to offer coverage to employees and dependents or face possible penalties under the employer shared responsibility requirements of the ACA. **IRS guidance defined dependent to exclude spouses. As such, an ALE does not have to offer coverage to spouses to avoid ACA penalties. This determination has rekindled employer interest in spousal exclusions or other forms of limiting spousal coverage.**

The availability of ACA's individual coverage subsidies if a person is not offered coverage is also fueling this rethinking of spousal coverage. If a spouse is not eligible for coverage at all, then they may be able to purchase coverage through the marketplace and qualify for a subsidy based on household income. Alternatively, if the spouse is eligible for coverage through their husband or wife's employer then the spouse will not be eligible for a subsidy. This is the case even if the added cost for the spouse through the employer plan that is available to them is more costly than they wish to pay.

The impending 40% excise tax commonly called the Cadillac tax is also stimulating this interest. By excluding spouses, the premium/value of family coverage to the employee for purposes of the tax would be lower.

Employers have long understood that having spouses and dependents on their plans has a cost. Many employers have contributed toward the cost of spouse and dependent coverage. Even when employers don't contribute to spousal or dependent coverage, if the plan is experience rated or self-funded, there is increased claim exposure.

One of the easiest means employers have to discourage spousal coverage has been, and continues to be, how much the employee must contribute to the premium to cover a spouse. It is not uncommon for working spouses to evaluate the generosity of the offers of their respective employers and select the one plan that provides the most coverage for the premium contributions required. **Discouraging spousal coverage through required contributions is one of the less controversial methods to reduce the number of spouses choosing to enroll in a plan.**

Considerations

Employers have two (2) main options to consider when addressing changes to spousal coverage. One is a "spousal carve out" and the other is a "spousal surcharge." The "spousal carve out" excludes all or certain spouses from coverage – generally those who have an offer of coverage from their own employer. The "spousal surcharge" charges a higher premium to an employee who enrolls a spouse if the spouse had the option of coverage through the spouse's employer.

In general, excluding spousal coverage does not appear to be a violation of federal law. There may, however, be implications for employers with insured plans**. Employers with insured plans who are contemplating excluding spouses should ascertain that coverage for spouses is not required by state law.** Employers that have insured health plans must also ascertain that their insurance company's underwriting guidelines allow for the exclusion of spouses or that the rates contemplate this action.

Some employers are excluding only those spouses who have access to coverage through their own employer. Spouses of employees that don't have coverage offered, either because their employer does not provide coverage, the spouse works part-time and isn't eligible for their own employer's coverage or because the spouse doesn't work outside the home, are considered eligible for the coverage.

HIPAA is an issue of some concern when considering which eligibility approach to deploy. Under HIPAA, if a spouse loses coverage through their employer they will have special enrollment rights to enroll in the coverage of their spouse's employer.

It is less clear whether a spouse who is excluded from coverage benefits from HIPAA's special enrollment rights. If an employer plan excludes spouses who have access to coverage through their own employer, then one could argue that the spouse was not previously eligible for coverage so no HIPAA right results. Given this ambiguity, employers should specifically determine their stance on this question and clearly communicate to employees the stance that the employer is staking on this issue. Contractual agreements with stop-loss carriers or other vendors as well as plan documents should specify how these situations will be addressed.

Caveats

The chief difficulty in implementing a spousal carve out or surcharge is administrative. Among the administrative considerations are:

- Will the employer consider any coverage available to a spouse as excluding them or triggering the surcharge or must other coverage meet a threshold that triggers an exclusion? For example, a spouse may have limited benefit options that exclude certain providers that are desirable and included in the other spouse's plan. Could a spouse then be deemed to be eligible?
- How will the employer verify that a spouse has an offer of other coverage?
- How often will the employer require confirmation of an eligible spouse's status; reflecting the fact that a spouse may have increased hours or obtained employment and is now eligible for their own employer's coverage?
- Will the employer require an affidavit or other attestation from an employee regarding spousal eligibility for coverage?
- What disciplinary steps will an employer take if an employee misrepresents the spouse's availability of coverage?

Employers contemplating a change in spousal eligibility should also consider the reactions of employees to the change and the public relations impact. A company that has a reputation or persona that it is "family friendly" could be seen as hypocritical as a result of implementing a spousal exclusion plan.

Employees may have a negative reaction to a change in treatment of spouses. The change is generally seen as a reduction in benefits. Also, some employees see these programs as unfair. This is especially if there is a surcharge to cover a spouse, as employees in the same job would wind up paying different amounts for the same level of coverage due to one being subject to a surcharge while another is not.

To address the perceived inequity or concern about reductions in benefits, some employers are, instead, offering taxable incentives for employees to not enroll spouses – whether the spouse has access to other

coverage or not. Unfortunately, this approach often costs an employer more by providing incentives to employees who would not have enrolled their spouses anyway.

The Legal "Fine Print"

There is a concern that "cash in lieu" programs, whether they are incentives or surcharges, may have to be taken into account in an employer's calculation of plan affordability for ACA purposes. Some analysts suggest that an incentive or surcharge must be added to the employee required contribution to coverage as these amounts are factored into an employee's decision. Whether final IRS guidance confirms these analyses and whether spousal incentives or surcharges would be seen as impacting the affordability for employee coverage remains to be clarified.

Employers contemplating a restriction or elimination of spousal coverage may want to evaluate the expected savings, if any, against the new administrative costs to implement and monitor the plan. Employees should be given significant advance notice of the impending change so that they can assess their options. And, employers will need to amend their SPDs, plan documents and employees communications to reflect the changes.

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