Use Care Before Using "Skinny Plan" Option As Code Section 4980H Tool

Employers considering skinny plans and the brokers, third party administrators (TPAs), insurers and consultants recommending the use of these arrangements alone or as part of a broader health plan design should seek qualified legal advice for help with structuring and implementing these arrangements to avoid potential traps and missteps that could trigger unanticipated benefits, costs and/or tax consequences. While offering some potential for certain employers, employers must carefully evaluate the potential suitability, benefits, risks and resultant responsibilities of including skinny plan options in their group health benefit offerings and ensure that any such arrangements are properly designed and administered to comply with applicable requirements.

Why Code Section 4980H Has Fueled Growing Skinny Plan Option Hype

Over the past year, many brokers and consultants have advocated that employers adopt a "preventive only" or "skinny plan" to low paid or other groups of employees as a means of avoiding liability for the potential $165 per month "employer shared liability payment" now scheduled to take effect for employers of more than 100 employees on January 1, 2015 and later for employers of more than 50 employees under Internal Revenue Code (Code) Section 4980H(a) (the "A Penalty").

The Code Section 4980H rules are only one of a plethora of federal mandates and rules applicable to group health plans and their employers under federal law as a result of the health care reforms of the Patient Protection & Affordable Care Act (ACA) as well as a host of previously enacted federal laws.

Enthusiasm for the skinny plan option has been fueled by IRS guidance originally in IRS Notice 2013-54 and its subsequent publication in February 2014 of its final regulations implementing Code Section 4980H that reflect that most plans that pay or provide for reimbursement of medical care costs might qualify as the “minimum essential coverage” necessary to avoid triggering the penalty under Code Section 4980H(a) as long as the arrangement is not an “excepted benefit plan” for purposes of ACA.

While a properly implemented ”skinny plan” option may work for many employers with self-insured health plans, getting past the Code Section 4890H(a) employer shared responsibility payment doesn’t necessarily mean that the employer won’t face liability under Code Section 4980H. Furthermore, getting past Code Section 4980H isn’t all that employers, insurers, brokers and consultants need to consider when designing group health plans. In fact, an improperly designed skinny plan that avoids triggering liability under Code Section 4980H could trigger much greater liability than the penalty that the employer hoped to avoid by using the skinny plan.

While a full understanding of all the potential implications that may affect a decision to offer a skinny plan is beyond the scope of this short article, it often is helpful to begin by understanding first the mechanics of Code Section 4980H and its employer-shared responsibility payments.

Code Section 4980H Employer Shared Responsibility Penalty Basics

The A Penalty is one of two potential employer shared responsibility payments that Code Section 4980H may impose against a “large employer” that fails to provide the necessary coverage mandated to avoid triggering liability under Code Section 4980H. Under Code Section 4980H, there are two potential penalties that could be triggered: the penalty under Code Section 4980H(a) commonly called the "A Penalty" or the penalty under Code Section 4989H(b) commonly called the "B Penalty." Understanding the skinny plan hype starts with understanding the basics and applicability of these two potential penalties.

First, the Code Section 4980H penalty doesn't apply as long as the employer either doesn't have 50 or more full-time employees or non of its full-time employees enroll in subsidized health coverage through a health insurance exchange. Also, neither penalty under Code Section 4980H applies to any employer until at the earliest, January 1, 2015, when under the delayed effective date announced by the Obama Administration, employers with 100 or more full-time employees will become subject to Code Section 4980H. Employers of 50 to 99 full-time employees enjoy an even further delayed effective date and employers of fewer than 50 full-time employees are exempt.

The A Penalty under Code Section 4980H(a) results when a large employer fails to offer employee and dependent coverage providing "minimum essential coverage" to is full-time employees. The month A-Penalty amount generally will equal the result of the total number of all full-time employees of the employer minus 30, multiplied by $165 per month.

Just because an employer avoids the A Penalty by offering a plan providing minimum essential coverage to all employees does not necessarily mean it avoids liability under Code Section 4980H. An employer offering the minimum essential coverage under a group health plan to all employees needed to get past the A Penalty generally still risks liability under Code Section 4980H to pay the "B Penalty" of $250 per month for any employee who actually enrolls in health care coverage through a Health Insurance Exchange whose family adjusted gross income is less than 400% of the Federal Poverty Level (approximately $98,000), unless the skinny plan or another group health plan offered to the employee by the employee both:

- Provides both minimum essential coverage and the required "minimum value" within the meaning of Code Section 4980H; and
- Doesn't require the full-time employee to contribute more than 9.5% of his family adjusted gross income to qualify for the coverage offered under the group health plan.

Thus, while offering a skinny plan to all full-time employees may allow an employer to avoid liability for the A Penalty, an employer offering a skinny plan risks liability for the B Penalty of $250 per month for each employee whose family adjusted gross income is less than 400% of the Federal Poverty Level who actually choses to enroll in the richer health care coverage offered through the Health Insurance Exchanges rather than the skinny plan offered by the employer.

Since ACA provides subsidies for many employees with family adjusted gross incomes of less than 400% of the Federal Poverty Level, offering only a skinny plan alone creates a risk for employers that employ a significant number of these lower paid employees that employees will choose to enroll in health insurance coverage offered through the Health Insurance Exchange with subsidies rather than the skinny plan. To the extent that this occurs, the offering of the skinny plan actually may increase the liability under Code Section 4980H of that employer for that employee from $165 per month to $250 per month. Some skinny plan proponents may pooh-pooh this risk, arguing that the cost for an employer that incurs the B Penalty will not be higher because See Code § 4980H(b)(2) caps the amount of the B Penalty at the amount of the A Penalty. While it technically is true that this means that the amount of the B Penalty will not exceed the amount of the A Penalty that the employer would have incurred had it not provided any coverage, the fact remains that the cost to the employer could still be greater because in addition to the B Penalty, the employer also will have incurred the cost of coverage and compliance to provide the skinny plan in addition to the B Penalty incurred. Accordingly, employers considering this approach need to carefully evaluate their workforce to assess the potential exposure to B Penalties before assuming that avoiding the A Penalty is the best option for their organization and options to mitigate their downside exposures.

To reduce this risk, many consultants and brokers may suggest that the employer adopt a group health plan that offers all full-time employees the option to choose either to enroll in a skinny plan, to enroll in a group health plan coverage option that provides minimum essential coverage offering minimum value at a higher cost than the cost of the skinny plan coverage, or to forego coverage under the group health plan. Since current IRS guidance states that offering group health plan coverage under a group health plan providing both minimum value and minimum essential coverage with an employee premium of less than 9.5 percent of family adjusted gross income will avoid liability under for the B Penalty for an employee even if an employee who otherwise would qualify for a subsidy choses to enroll in health insurance coverage through the Health Insurance Exchange, this design, properly implemented, may allow the employer to avoid liability under Code Section 4980H. However, this is not all that an employer needs to worry about. In fact, unless the group health plans including the skinny plan meets other rules and the discrimination rules applicable to the group health plan and the cafeteria plan through which the enrollment choices are offered meet applicable nondiscrimination requirements, the employer may create unanticipated exposures equal to or greater to the Code Section 4980H liability that the employer seeks to avoid.

Other Traps To Step To Beyond Code Section 4980H May Carry Bigger Risks

Code Section 4980H is only one of several issues that employers contemplating offering skinny plan designs alone or along with an alternative minimum essential coverage, minimum value group health plan coverage option must consider a plethora of other applicable laws and regulations, some of the most significant of which are highlighted in the following paragraphs.

First, when deciding the skinny plan or other group health plan design, employers and their insurers, brokers, administrators and consultants need to ensure that the benefit plan coverage, benefits and other terms meet all applicable mandates of applicable federal, and in the case of insured, multiple employer welfare arrangements (MEWAs) and certain staffing and leasing company arrangements, ACA's insured plan mandates and other applicable state insurance rules. Federal law imposes a wide range of mandates on group health plans beyond the requirements of Code Section 4980H. These include additional coverage, benefit, and nondiscrimination rules added to the Employee Retirement Income Security Act (ERISA), the Code, the Public Health Services Act and other provisions of the Social Security Act, by laws like the Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA), the Health Insurance Portability & Accountability Act (HIPAA), Code health and cafeteria plan nondiscrimination rules, federal laws mandating coverage for breast cancer, newborns and mothers, mental health and substance abuse, ACA's coverage, benefit, non-discrimination, procedural and other reforms and various other requirements. Where a group health plan is or is treated as insured, ACA, as well as state insurance regulations impose additional mandates. Any group health plan must be designed to meet these rules. Because ACA and state insurance requirements for insured, MEWA and other arrangements subject to regulation as insured group health programs generally mandate that the arrangement meet ACA's essential health benefit requirements as well as other ACA and state insurance mandates, current federal and state regulations generally make it unlikely that a skinny plan option that qualifies as minimum essential coverage plans can be offered through an insured, a MEWA or other arrangement subject to regulation as an insured program. Even where the arrangement is self-insured, ACA and other the inclusion of prescription drug or wellness benefits covering a wide range of conditions and treatments along with an otherwise skinny plan design many trigger mental health parity or other mandates often overlooked by brokers and consultants promoting these arrangements. While guidance is still evolving, there also exists a risk that the scope of mandates also can be greater than expected if the skinny plan is offered with an insured "limited benefit" or other insurance benefit arrangement in a manner that is considered integrated with the skinny plan. Furthermore, regardless if the arrangement is insured or self-insured, failure to comply with these mandates can trigger significant liability including in the case of many of these rules, the obligation to self-identify, self-report, self-assess, and pay penalties under Code Section 6039D of a minimum penalty of the greater of $2500 or $100 per day, as well as any other liability as otherwise applies under ERISA and the Code to participants, the IRS and DOL, or both.

Second, even if the arrangement is self-insured, employers, their administrators, brokers, consultants and advisors need to monitor whether the arrangement is discriminatory under the group health plan nondiscrimination rules or cafeteria plan discrimination rules of the Code. Particularly where it is possible that highly compensated or key employees will enroll in coverage or a richer coverage option, while lower paid workers will forego enrollment or chose the skinny plan over enrolling in a richer minimum value, minimum essential coverage option, an employer must test to determine if the arrangement discriminates in favor of key or highly compensated employees for purposes of Code Section 125. If so, at minimum, the employer will want to ensure that its cafeteria plan is drafted to require and that discriminatory contributions are recharacterized and reported to highly compensated and key employees as after-tax, taxable contributions. It also is equally important that the discriminatory status of the arrangement under Code Section 105(h) be considered for a self-insured program and to the extent that the arrangement is discriminatory that income be reported to highly compensated employees as well. It should be noted that the harsh nondiscrimination rules and draconian liabilities that can result from offering a discriminatory insured group health plan would add nondiscrimination concerns to the challenges of designing an insured skinny plan that could comply with applicable mandates discussed earlier.

Use Care When Considering Or Using Skinny Plan Design

Accordingly, while some employers may benefit from including a properly designed and implemented skinny plan option in their group health plan design, employers need to act carefully to ensure that the design is appropriate and properly integrated and administered. Those considering these plans should use care (a) to ensure that the plan is self-insured and not an insured plan or MEWA subject to ACA's insurance reforms and/or state mandates; (b) meet all required federal and state mandates; (c) are tested for potential discrimination issues under Code sections 125 and 105(h); (d) are not paired with insurance contracts considered to be excepted insurance policies in a way that is considered integrated to trigger unexpected mandates and costs; and (e) when an employer group has a large group of subsidy-eligible employees, that the offering of a skinny plan doesn't result in an increase in the employer's Code Section 4980H liability by triggering the larger Code Section 4980H(b) penalty of $250 per month instead of the smaller Code Section 4980H(a) penalty of $165 per month.

For Advice, Training & Other Resources

If you need assistance monitoring these and other regulatory policy, enforcement, litigation or other developments, or to review or respond to these or other workforce, benefits and compensation, performance and risk management, compliance, enforcement or management concerns, the author of this update, attorney Cynthia Marcotte Stamer may be able to help.