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Can Different Employee Groups Be Offered Different Health Plans?

Lois A. Gleason, CEBS, manager of Reference/Research Services, and Sharon T. Olecheck and Amanda S. Wilke, information/research specialists, answer frequently asked questions about the Affordable Care Act (ACA). Answers to similar questions can be found at ACA University, the International Foundation's virtual learning environment providing ongoing education on ACA. Visit www.ifebp.org/acau for more information. For personalized research on any benefits topic, contact the Information Center at www.ifebp.org/infocenter. (These answers do not constitute legal advice. Please consult your plan professionals for legal advice.)

Under ACA, may an employer still offer different health plan benefits to different groups of employees?

ACA does not contain a rule stating all employees must be offered the same benefits. Under existing federal laws and regulations, different groups of employees may be offered different benefits, as long as the different groups are based on bona fide employment-based classifications of similarly situated employees, consistent with the employer's usual business practice. Examples of bona fide employment-based classifications include salaried vs. hourly, part-time vs. full-time, length of service and geographic locations of work. The different classifications must not be based on health factors.

Note: Internal Revenue Code (IRC) Section 125 cafeteria plans must follow their own set of nondiscrimination rules.

Highly Compensated Employees

IRC Section 105 prohibits self-funded health plans from discriminating in favor of highly compensated employees. ACA extends this requirement to nongrandfathered insured plans. However, no rules prescribing the requirement have been issued, and the Internal Revenue Service will not enforce this nondiscrimination provision for insured plans until after rules are issued.

Discrimination in General

When designing a benefits program, employers need to consider carefully the ramifications of the benefits offered to and accepted by employees. Overlapping federal and state laws prohibit many types of discrimination such as age, gender, gender identity, sexual orientation, race, ethnicity, country of origin, religion, pregnancy, genetics, health status and military service. Obtaining legal counsel is recommended when designing or redesigning employee benefit plans to make sure they are not discriminatory and do not violate federal or state laws.

Resources

HIPAA Nondiscrimination Requirements, U.S. Department of Labor, www.dol.gov/ebsa/faqs/faq_hipaa_ND.html.

IRS Notice 2011-1, ACA Nondiscrimination Provisions Applicable to Insured Group Health Plans, www.irs.gov/pub/irs-drop/n-11-01.pdf.

IRC Section 105, www.law.cornell.edu/uscode/text/26/105.



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Can an employer impose a “dependent surcharge” similar to a “spousal surcharge” for coverage of dependent children between the ages of 18 and 26?

No. Group health plans that offer dependent child coverage must make such coverage available for children until attainment of 26 years of age, and the plan terms for dependent children cannot vary based on age (except for children who are aged 26 or older). The surcharge issue was used as an example in the interim final rules and retained as part of the preamble to the final rules:

Example 1

Facts. A group health plan offers a choice of self-only or family health coverage. Dependent coverage is provided under family health coverage for children of participants who have not attained age 26. The plan imposes an additional premium surcharge for children who are older than age 18.

Conclusion. In this Example 1, the plan violates the requirement of paragraph (d) of this section because the plan varies the terms for dependent coverage of children based on age.

In the past, grandfathered health plans could exclude dependent children who had not reached the age of 26 if the child was eligible to enroll in an employer-sponsored health plan (other than that of the parent). This transition rule expired in 2014, and these children can no longer be excluded.

Resources

Preamble to Final Rules for Grandfathered Plans, Preexisting Condition Exclusions, Lifetime and Annual Limits, Rescissions, Dependent Coverage, Appeals, and Patient Protections Under the Affordable Care Act, 26 C.F.R. Part 54; 29 C.F.R. Part 2590; 45 C.F.R. Parts 144, 146, and 147, 80 *Fed. Reg.* 72191, 72206 (Nov. 18, 2015), www.federalregister.gov/articles/2015/11/18/2015-29294/final-rules-for-grandfathered-plans-preexisting-condition-exclusions-lifetime-and-annual-limits.

Interim Final Rules Relating to Dependent Coverage of Children to Age 26 Under PPACA, 26 C.F.R. Parts 54 and

602; 29 C.F.R. Part 2590; 45 C.F.R. Parts 144, 146, and 147, 75 *Fed. Reg.* 27121 (May 13, 2010), www.federalregister.gov/articles/2010/05/13/2010-11391/interim-final-rules-for-group-health-plans-and-health-insurance-issuers-relating-to-dependent.

Under ACA, can an employee waive coverage without the employer being penalized?

Yes. Employers are penalized only if an employee applies for and receives a subsidy to purchase coverage through the public exchanges. An employer is not penalized for an employee declining coverage as long as the coverage is offered to at least 95% of all full-time employees and the offered coverage is both affordable and has minimum value.

If an employer-sponsored health plan covers at least 60% of the total allowed cost of benefits, the plan is said to provide minimum value.

A plan is determined to be affordable if the employee's required contribution for self-only coverage does not exceed 9.66% of the employee's household income for the year (for plan years beginning in 2016) or 9.56% (for plan years beginning in 2015) or if one of three safe harbors is met. Because an employer typically does not know an employee's household income in making the affordability determination, the safe harbors are allowed. Employers are allowed to use Form W-2 wages, an employee's rate of pay or the federal poverty line instead of household income in determining affordability.

Resources

Employer Shared Responsibility Provisions, IRS, September 14, 2015, www.irs.gov/Affordable-Care-Act/Employers/Employer-Shared-Responsibility-Provisions.

Minimum Value and Affordability, IRS, December 7, 2015, www.irs.gov/Affordable-Care-Act/Employers/Minimum-Value-and-Affordability.

IRS Revenue Procedure 2014-62, www.irs.gov/pub/irs-drop/rp-14-62.pdf.

“Employees Declining Coverage Under the Affordable Care Act,” FrankCrum, February 4, 2014, <http://blog.frankcrum.com/2014/02/employees-declining-coverage-under-the-affordable-care-act>.

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