What New ACA Proposed Regulations Mean for Expatriate Health Coverage and Employers

The **number one question smart employers and HR professionals are asking** right now is:

"Does the health insurance plan we're offering to our expatriates still cover us for ACA?"

Because the Departments of Treasury, Labor, and Health and Human Services ("the Departments") just put out new proposed regulations in June 2016 under the Expatriate Health Coverage Clarification Act of 2014 ("EHCCA"). While most of the guidance in the proposed regulations reflects past guidance and the requirements of the EHCCA, some **definitions have changed** and how some of the Affordable Care Act ("ACA") and EHCCA rules are applied has changed.

That's why it's important for employers and plan sponsors to meet with their benefits advisors and legal counsel to review the new guidance and **make sure the plans they're offering still meet the latest ACA Minimum Essential Coverage ("MEC") criteria**.

Because not only can offering the **wrong plan short change your expat employees** – it **could also lead to thousands of dollars in fines** when tax filing season rolls around.

Highlights

The proposed regulations say that coverage under a qualified expatriate health plan from a qualified U.S. issuer will qualify as MEC for all covered members beginning January 1, 2017, satisfying the individual mandate in the ACA. (Keep reading for the definition of a qualified expatriate health plan.) Coverage should include inpatient hospital services, outpatient facility services, physician services and emergency services. Group or individual supplemental health insurance benefits and travel insurance are specifically called out as excepted benefits and do not qualify as MEC.

The proposed regulations maintain that qualified expatriate health plans will not be subject to many of the ACA market reform provisions, such as annual and lifetime limits, essential health benefits, 90-day waiting period, no-cost preventive services and the Summary of Benefits and Coverage requirements. These plans will not be subject to the Patient-Centered Outcomes Research Institute ("PCORI") and reinsurance fees, and insured plans will also not be subject to the health industry taxes.

However, expatriate health plans will not be completely shielded from the ACA either. These plans will be subject to the ACA Cadillac Tax for a qualified expatriate who is assigned rather than transferred to work in the U.S. Future guidance is expected on this matter. The Cadillac Tax becomes effective January 1, 2020.

Qualified expatriate plans are also subject to the ACA reporting requirements under IRC Sections 6055 and 6056 that began for calendar year 2015. Issuers and employers may automatically deliver the Forms 1095 (B and/or C) electronically, as long as a notice is issued at least 30 days prior to the statement due date (January 31) to allow the plan participant time to refuse electronic distribution of these tax forms.

Other highlights include:

- The period for excluding preexisting conditions must be reduced by the length of time of creditable coverage a person had without a 63-day break in coverage.
- A non-U.S. health insurer cannot qualify as an issuer of expat health insurance under EHCCA.
- Short-term limited duration insurance will be limited to a term of less than three months with or without the insurer's consent, and this term limit will need to be communicated upfront in the application materials.

- In order for certain kinds of insurance to be considered excepted benefits, such as hospital and other indemnity insurance, issuers must include a notice in enrollment materials that states the coverage they're offering is supplemental to major medical coverage and that failure to have MEC may result in additional fees or taxes.

Comments about the proposed rules may be submitted through August 9, 2016.

Background

Health insurance for expatriates has always enjoyed some exclusions from ACA rules, simply because it's hard to regulate insurers that are beholden to other foreign state laws and regulations – and because there are so many different countries with so many different standards of health care.

However, while portions of the ACA generally don't apply to expatriate health plans, employers as plan sponsors of expatriate health plans, and expatriate health insurers, the EHCCA does maintain some ACA requirements, such as the employer mandate and information reporting requirements.

The EHCCA went into effect for fully insured and self-funded expatriate group health plans that were issued or renewed on and after July 1, 2015. Prior to the EHCCA, the ACA gave expatriate health plans some relief from ACA provisions, such as market reforms, for plan years ending on or before December 31, 2016.

Who is a qualified expatriate?

There are two official definitions of an expatriate for the government's purposes:

A *Category A Expatriate* is someone who is not a U.S. National but whose skills, qualifications, job duties or expertise qualify him or her to be transferred or assigned to work in the U.S. for a specific or temporary purpose or assignment tied to employment. The individual generally requires access to health coverage in multiple countries and is offered other multinational benefits, such as tax equalization or compensation to return to the home country. These individuals are sometimes referred to as "inpatriates".

A *Category "B" Expatriate* is a person who is a U.S. National who works outside the U.S. for at least 180 days in a 12-month period that overlaps with the plan year (single plan year or two consecutive plan years).

(NOTE: The term ''national of the United States'' means (A) a citizen of the United States, or (B) a person who, though not a citizen of the United States, owes permanent allegiance to the United States. For example, an individual born in American Samoa is a national of the United States.)

Who qualifies as an issuer or administrator of expatriate plans?

In order for certain ACA exemptions to apply to an expatriate plan, an issuer of insured expatriate plans and an administrator of self-funded plans must meet the following criteria:

- Is licensed (or authorized) to operate in more than two countries, including the U.S. (An issuer must be licensed to engage in the business of insurance in a state and must be subject to state insurance law. In this regard, a state means Puerto Rico, Virgin Islands, Guam, American Samoa, and the Northern Mariana islands.)
- Has provider networks in eight or more countries to provide direct claim payments to providers.
- Maintains call centers in three or more countries with services in eight or more languages.
- Processes at least $1 million in claims in foreign currency equivalents during the prior calendar year.
- Provides global evacuation and repatriation services.
- Maintains legal and compliance resources in three or more countries.
- Offers reimbursement in local currency of eight or more countries.

Each of these requirements may be satisfied by two or more entities (including the health insurance issuer) that are members of a controlled group of companies.

Should the issuer or administrator not meet these qualifications, the issuer or administrator should first review the MEC qualifications and standards. Then, they can apply to the Department of Health and Human Services to have their plan(s) reviewed to determine MEC status.

As mentioned before, a non-U.S. health insurance issuer doesn't qualify as an expatriate health insurance issuer, meaning any insurance issued by such a provider would not be considered MEC under ACA.

What is a qualified expatriate health plan?

A self-funded or insured group health plan will be considered a qualified expatriate health plan that will satisfy MEC for the ACA individual and employer mandates if the plan:

- Covers 95% of qualified expatriates who are primary enrollees as well as their dependents on the first day of the plan year. A primary enrollee excludes individuals who are not U.S. Nationals residing in the country of their citizenship. For example, if an expatriate plan is covering 100 U.S. Nationals (who are primary enrollees) in Country Y and the plan also covers 200 Country Y Nationals, the plan will qualify as an expatriate plan, as the Country Y Nationals are not counted in the 95% test.
- Provides comprehensive benefits (not just excepted benefits) that the plan sponsor believes will satisfy the minimum value standard of the ACA taking into account the ACA essential health benefits.
- Offers inpatient hospital and outpatient facility services, physician and emergency services and generally covers benefits and/or offers certain protections as outlined in other federal laws, such as the Mental Health Parity Act, the Newborns and Mothers Health Protection Act, and the Health Insurance Portability and Accountability Act.
- Covers dependent children up to age 26 (when dependent coverage is available).

Still have questions about whether your benefits qualify as MEC? Feel free to reach out to a member of the Cherry Bekaert Benefits Consulting team for a free benefits review from one of our top advisors in the area of expatriate health insurance. We'll be happy to cover any questions you still have – and maybe answer a few you didn't know you had.

For additional information about our services, please contact Kyle Frigon at 404-733-3256 or via email at: kfrigon@cherrybekaertbenefits.com.