July 27, 2015

Frequently Asked Questions Regarding the "Cadillac" Health Plan Tax

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On June 25, 2015, in *King v. Burwell*, the United States Supreme Court again rejected a major challenge to the Affordable Care Act ("ACA"). With this decision, the ACA is here to stay and employers should immediately begin planning for its implementation and consider what impact it may have on their current and future health care benefits.

Beginning in 2018, the ACA imposes an excise tax on high cost health plan coverage, also known as the "Cadillac" Tax. Consequently, employers must consider the cost of health care premiums and the Cadillac Tax when negotiating collective bargaining agreements that extend into 2018 and beyond. Now is the time for employers to develop bargaining strategies to avoid the Cadillac Tax. Even though many employers may not consider their plans overly generous or excessive, the cost of some fairly common plans may end up exceeding the applicable thresholds, especially plans in states that have relatively high medical costs, such as Pennsylvania, Michigan, Illinois and much of the Northeast.

Unfortunately, the Internal Revenue Service ("IRS") is still in the process of issuing the regulations that will guide the implementation of the Cadillac Tax. As such, there remains a number of open issues regarding this tax. The following FAQs address some of the basics and some of the important outstanding questions regarding the ACA's Cadillac Tax.

What is the Cadillac Tax?
A: The ACA imposes a 40% excise tax on the cost of health care benefits that exceed a certain limit. If the aggregate cost of health care coverage provided to an employee exceeds a statutory dollar limit, the excess benefit is subject to a 40% excise tax.

When will the Cadillac Tax go into effect?
A: The Cadillac Tax is scheduled to go into effect on January 1, 2018.

What is the dollar amount of the standard cap for active employees?
A: The Cadillac Tax only applies to the amount by which the cost of certain employer-provided health care benefits exceed the statutory dollar limit. For 2018, the standard cap is set at $10,200 for annual individual coverage and $27,500 for all other categories of coverage, such as employee plus spouse, or family coverage. This standard annual cap may be higher in 2018 depending on the growth in health care costs since the ACA was passed in 2010. The IRS has not yet made that determination and it is unclear when the IRS will make that determination. After 2018, the annual cap is subject to additional adjustments based on inflation and age and gender factors specific to individual employee populations.

What is the dollar amount of the cap for police officers, firefighters, and "qualified" retirees?
A: The cap is higher for certain retirees who are not eligible for Medicare, as well as employees in a high-risk profession, such as police officers and firefighters. In 2018, the cap for qualifying retirees, police officers, and firefighters will be $11,850 for annual individual coverage and $30,950 for all other categories of coverage, such as employee plus spouse, or family coverage. Again, the IRS may increase this high-risk and retiree annual cap in 2018 if it determines that the actual growth in national health care costs exceeded expected growth. After 2018, the IRS will adjust the cap to reflect inflation. The employer must employ the majority of employees in the health plan in high-risk professions or qualified retirees. Therefore, the standard cap may apply if an employer's health plan includes both uniform and non-uniform employees.

What type of benefit premiums and payments count towards the cap?

A: The Cadillac Tax will only consider certain types of benefits for determining the tax. Eventually, the IRS will issue final regulations identifying each of the benefits subject to the calculation of the tax. In the meantime, it is expected that the IRS will count the following benefits:

1. The full medical premium, including both the employer-paid and employee-paid portions;
2. Employer contributions and employee salary reductions to Flexible Savings Accounts ("FSAs");
3. Employer contributions and employee salary reductions to Health Savings Accounts ("HSAs") and Health Reimbursement Arrangements ("HRAs"); and
4. Payments for multiemployer plan coverage.

What type of benefits do not count towards the cap?

A: Again, the actual health care costs that will not count towards the cap remain unknown because the IRS has not yet issued final regulations. Until the IRS issues further guidance, employers may assume that the IRS will not include the following in the Cadillac Tax:

1. Cost-sharing amounts paid by employees, such as deductibles, coinsurance and co-payments;
2. Stand-alone dental and vision benefits;
3. Worker's compensation insurance;
4. Long-term care insurance;
5. Accident and disability income insurance;
6. Liability insurance, including general liability insurance and automobile liability insurance; and
7. Automobile medical payment insurance.

Do employee contributions to HSAs count towards the cap?

A: Employer contributions to employee HSAs are included in calculating the Cadillac Tax. However, it is unclear how the IRS will treat employee contributions. In February 2015, the IRS issued guidance indicating that it would include employee pre-tax salary reductions to HSAs in calculating the Cadillac Tax, but that it would exclude employee contributions to HSAs on an after-tax basis. Until the IRS issues final regulations regarding employee HSA contributions, it is advisable to treat all salary reductions to HSAs as subject to the Cadillac Tax.

How will the IRS calculate the cost of benefits?

A: Generally, the IRS will use the rules to determine COBRA continuation coverage premiums to calculate the benefits that count towards the cap. For fully-insured plans, the employer will use the applicable premium charged by the insurer for such coverage to calculate the benefits that count toward the cap. For self-insured plans and arrangements, employers will use an actuarial calculation or the past costs of benefits under the plan. In addition, as noted in the earlier FAQs, the cost of benefits generally will include employer contributions to FSAs, HSAs and HRAs, as well as employee pre-tax contributions to such arrangements. However, the IRS has acknowledged that there remains significant questions relating to the method for calculating the cost of benefits that count towards the cap which will need to be addressed in the final regulations.

Who calculates and who pays the Cadillac Tax?

A: The employer calculates the amount of the tax in all cases. For insured plans, the health insurance carrier is responsible for paying the tax. For self-insured plans, the administrator (in many instances the employer) is responsible for paying the tax. As a practical matter, employers will likely pay for any Cadillac Taxes in the form of higher premiums and fees.

Can the employer pass some or all of the Cadillac Tax on to employees?

A: There is nothing in the law or the current IRS guidance that would prevent employers from passing the actual cost of the excise tax on to the employees.

How can an employer address a potential Cadillac Tax issue?

A: Employers can reduce the cost of their health care plan by adding or increasing cost-sharing amounts such as deductibles and co-pays, as well as adopting employee wellness programs that may contribute to lower premiums and health care costs. Employers who are negotiating a collective bargaining agreement with a union that will extend into or through 2018 should definitely address the potential impact of the Cadillac Tax. Unfortunately, it is impossible to determine that potential impact today. Consequently, an

employer could negotiate for a reopener clause that would permit the parties to renegotiate health care benefits to avoid the tax. A preferable method would be to incorporate flexibility directly into the bargaining agreement that would allow an employer to revise union employee coverage to avoid the Cadillac Tax without having to negotiate those changes.

The Cadillac Tax rules could apply to virtually any employer, regardless of whether they have collective bargaining agreements. Consequently, all employers should start to analyze the costs of their health care plans to determine if they are subject to the tax and begin planning on how to avoid or minimize the tax.

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