OPT-OUT PROGRAMS – BEST PRACTICES

PRESENTER:  
Kelly Hugh, JD  
Human Resources Consultant  
khugh@44n.com

www.44n.com
Three issues to consider when implementing opt-out programs:

1. Section 125 Plan Regulations
2. Medicare Secondary Payer Regulations
3. Employer Payment Plan Issue under ACA

Note:
This presentation does not address the implications an opt-out payment has on affordability under the ACA.
Opt-Out Incentive Programs

Medical Opt-Out Programs = Medical Waiver Programs, Opt-Out Incentive, Cash-in-Lieu

Purpose:

• To provide an employer the option of making a payment of taxable cash compensation (i.e. an incentive) to eligible EEs who decline the employer’s group medical coverage.

• To encourage EEs to enroll in other coverage to reduce employer’s plan costs and claims experience.

• Regardless of the name, they are all the same thing.
WARNING:

• If the opt-out benefit is not included in the written Section 125 plan document, employees who elect pre-tax coverage under the health plan will be taxed on an amount equal to the opt-out amount they would have received if they waived.

BEST PRACTICE:

• Make sure that the opt-out benefit is contained in the Employer’s section 125 plan document as a benefit option under the plan
• If it is not, amend the plan document accordingly.
• Remember -- Opt-out payments are considered taxable compensation included in the employee’s gross income – ALWAYS.
**RULE:**

OPT-OUT PAYMENTS TO MEDICARE ELIGIBLE EMPLOYEES ARE PROHIBITED FOR EMPLOYERS OF 20 OR MORE because they are considered prohibited incentives under MSP rules.

General rule is that an employer (with 20 or more EEs) cannot offer, subsidize, or incentivize any active Medicare eligible employee to not enroll in the employer’s group health plan.

- This rule applies even if the payments or benefits are offered to all other individuals who are eligible for coverage under the plan.
Opt-out payments fall into the “incentive” category prohibited by the MSP rules to the extent they apply to any active employees eligible for Medicare, UNLESS the active employees have their own coverage or coverage through a spouse that is primary to Medicare.

**BEST PRACTICES:**

- The opt-out provision in the written section 125 plan document should indicate that it is available only to the extent permitted by applicable law (which would include the MSP rules).
- Make sure that any active employee that is eligible for Medicare and who chooses the opt-out benefit is required to sign an affidavit that s/he is covered by his or her own or a spouse’s plan that is primary to Medicare.
ISSUE:

• Does an opt-out program included in a Section 125 plan constitute an “employer payment plan” per ACA as it could be construed as reimbursement for or direct payment of an employee’s individual insurance?

• If YES – the opt-out program violates ACA rules and would trigger employer excise tax ($100 per day per effected employee)
• Per IRS Notice 2015-17, general pay increase that is conditioned upon the purchase of health insurance constitutes an “employer payment plan” subject to ACA.

• It follows then that - IF an employer’s opt-out program requires proof of other coverage in order to receive the opt-out benefit, it may be deemed a general pay increase that is conditional upon the purchase of health coverage.

• How can an employer avoid this?
BEST PRACTICE:

Include specific disclaimers when including an opt-out program in a section 125 plan document to avoid any connection with an employer payment plan. Suggested language:

• The opt-out program is not intended to be a reimbursement benefit of any kind

• The cash benefit is taxable and is considered unrestricted cash compensation, and

• The cash benefit is not intended for the direct or indirect purchase/reimbursement of any other medical insurance premium (whether individual or group coverage).

• Do not require proof of other coverage
Section 125 Plan Document Amendment

44North has begun to update the Opt-Out Program language in our plan documents.

Two Parts to the Amendment:

1. Added language to clarify that the opt-out option will operate pursuant to all applicable laws, including Medicare Secondary Payer rules

2. Added language to expressly disclaim that the opt-out option is not intended to be an employer payment plan and removed any requirement of proof of other coverage.
Other Considerations & Next Steps

- Consider implementing the Employee Acknowledgment for Medicare Eligible Employees
- Review current Collective Bargaining Agreements with counsel and union reps if opt-out payment is part of the CBA

QUESTIONS?
QUESTIONS OR COMMENTS