Dave Yost • Auditor of State

Bulletin 2015-002

Auditor of State Bulletin

DATE ISSUED: **March 26, 2015**

TO: **All Officials of Ohio Townships**
All Officials of Ohio Cities and Villages
All Officials of Ohio Schools
Ohio Prosecuting Attorneys

FROM: **Dave Yost, Ohio Auditor of State**

SUBJECT: **Effects of the Affordable Care Act (ACA) on Reimbursement of Health and Hospitalization Insurance Premiums, or Reimbursement for Medicare Parts B and D Premiums**

SUMMARY

A number of Ohio townships and representatives of the Ohio Township Association have inquired of the Auditor of State (AOS) as to the impact of the Affordable Care Act (ACA) on the practice of Ohio townships reimbursing employees and officers for hospitalization and health insurance premiums, and Medicare Parts B and D premiums. AOS has monitored the situation and researched relevant issues, and this Bulletin is provided to update Township officials on the status of the matter. In addition, AOS has prepared and is submitting to Ohio Attorney General Mike DeWine a request for an opinion which solicits his guidance as to these issues. Although this Bulletin is issued in response to concerns raised by Ohio townships and the Ohio Township Association, and describes statutory insurance reimbursement procedures which relate only to townships, other governmental entities may be providing similar reimbursement arrangements by local determination or as part of a collective bargaining agreement. The discussion contained in this Bulletin which relates to township insurance reimbursement arrangements may be applicable equally to such local arrangements.

I. FACTUAL BACKGROUND:

Many, if not most, Ohio townships provide reimbursement to township officers and employees for insurance premiums incurred by the officer or employee in securing health

and hospitalization insurance coverage from a source other than the township, and for the Medicare Parts B and D premiums of qualifying employees. This longstanding practice permits the township to facilitate the maintenance of insurance coverage for the protection and benefit of its employees and officers and their dependents with due regard to the cost of the coverage in public dollars. With the enactment of the ACA, Federal authorities have issued conflicting directives which suggest that these practices may constitute violations of provisions of that voluminous legislation and may subject townships engaging in the same to penalty.

Under Section 117.10(A) of the Ohio Revised Code, AOS is required to "…audit all public offices as provided…" in Chapter 117. Pursuant to Sections 117.11 and 117.01(G)(2)(b), all such audits are to include "[t]he determination by the auditor of state…of whether a public office has complied with all the laws, rules, ordinances, or orders pertaining to the public office." Further, Section 117.101 of the Ohio Revised Code requires that the Ohio Auditor of State "…provide, operate, and maintain a uniform and compatible computerized financial management and accounting system known as the uniform accounting network[.]" for the benefit and use of "…public offices, other than state agencies and the Ohio education computer network and public school districts…" The Uniform Accounting Network created under this authority includes provision for the reimbursement practices discussed in this Bulletin.

II. RELEVANT STATUTES:

Section 505.60 Insurance for officers and employees, alternatives

Section 505.60 of the Ohio Revised Code empowers boards of trustees of Ohio townships to "…procure and pay all or any part of the cost of insurance policies…" for the benefit of the "…officers and employees…" of the township which provide a number of designated types of insurance protection, including "…hospitalization, surgical care, major medical care…medical care…" That section provides further that, "[i]f any township officer or employee is denied coverage under a health care plan procured under this section or if any township officer or employee elects not to participate in the township's health care plan, the township may reimburse the officer or employee for each out-of-pocket premium attributable to the coverage provided for the officer or employee and their immediate dependents for insurance benefits described in division (A) of this section that the officer or employee otherwise obtains…" within certain limitations and under certain conditions.

Section 505.601 Reimbursement for out-of-pocket insurance premiums

Section 505.601 of the Ohio Revised Code is applicable to a township which "…does not procure an insurance policy or group health care services as provided in section 505.60 of the Revised Code…" In such instances, the enactment empowers the township to "…reimburse any township officer or employee for each out-of-pocket premium attributable to the coverage provided for that officer or employee for insurance benefits described in division (A) of section 505.60 of the Revised Code, that the officer or employee obtains…" within certain limitations and under certain conditions.

Section 505.603 Cash payments in lieu of benefits; health and wellness benefits; deduction from salary or wages

Section 505.603 of the Ohio Revised Code permits an Ohio township "[i]n addition to or in lieu of providing benefits to township officers and employees under section 505.60, (or) 505.601…of the Revised Code…" to "…offer benefits to officers and employees through a cafeteria plan that meets the requirements of section 125 of the 'Internal Revenue Code of 1986', 100 Stat. 2085, 26 U.S.C.A. 125, as amended." This section, as well, sets out certain limitations and conditions to the provision of such a benefit.

OHIO CONSTITUTION, ARTICLE II, SECTION 20: Legislature to fix terms and compensation; no compensation change during term

Article II, Section 20 of the Ohio Constitution provides that the Ohio General Assembly is to fix the term of elected officials and determine the compensation afforded such officers. The provision prohibits, however, any change in compensation which affects the compensation of any officer during his or her existing term, unless the office is abolished.

AFFORDABLE CARE ACT

On March 21, 2010, the United States Congress passed the "Patient Protection and Affordable Care Act" (Public Law 111-148) which was signed into law by President Barack Obama on March 23, 2010. That enactment, together with the "Health Care and Education Reconciliation Act" which was signed on March 30, 2010, codifies amendments to the United States Internal Revenue Code and certain provisions contained within Title 42 of the United States Code, and constituted a significant regulatory overhaul of the United States health care system and its processes.

III. FEDERAL INTERPRETATIONS AND DIRECTIVES

Subsequently, the United States Internal Revenue Service ("IRS Notice 2013-54"), and the United States Department of Labor ("Department of Labor Technical Release 2013-03") issued guidance and directives on the subject of employer reimbursement of health and hospitalization premiums. This material was widely interpreted to mean that, under the Affordable Care Act, it remained permissible for employers to reimburse employees for health and hospitalization insurance premiums as to policies secured by the employee other than through the employer, but that any reimbursement amounts would be subject to personal tax liability attributable to the employee, and that no such reimbursement could be made with pre-tax or untaxed dollars.

On November 6, 2014, however, the Department of Labor, Employee Benefits Security Administration issued a document entitled "FAQs about Affordable Care Act Implementation (Part XXII)". "Q1" contained therein sets forth: "My employer offers employees cash to reimburse the purchase of an individual market policy. Does this

arrangement comply with the market reforms?" Thereafter, the document indicates in response that:

> "No. If the employer uses an arrangement that provides cash reimbursement for the purchase of an individual market policy, the employer's payment arrangement is part of a plan, fund or other arrangement established or maintained for the purpose of providing medical care to employees, without regard to whether the employer treats the money as pre-tax or post-tax to the employee. Therefore, the arrangement is group health plan coverage within the meaning of Code Section 9832(a), Employee Retirement Income Security Act (ERISA) section 733(a) and PHS Act Section 2791(a), and is subject to the market reform provisions of the Affordable Care Act applicable to group health plans. Such employer health care arrangements cannot be integrated with individual market policies to satisfy the market reforms, and, therefore, will violate PHS Act sections 2711 and 2713, among other provisions, which can trigger penalties such as excise taxes under section 4980D of the Code. Under the Department's prior published guidance, the cash arrangement fails to comply with the market reforms because the cash payment cannot be integrated with an individual market policy."

Under Section 146.145 of the Code of Federal Regulations, a "group health plan" is defined as "…an employee welfare benefit plan to the extent that the plan provides medical care (including items and services paid for as medical care) to the employees (including both current and former employees) or their dependents (as defined under the terms of the plan directly or through insurance, reimbursement, or otherwise)."

Recently, the United States Internal Revenue Service issued a document entitled "Notice 2015-17" which bears on these issues. As part of the same, it is indicated that:

> "This notice reiterates the conclusion in previous guidance addressing the employer payment plans, including Notice 2013-54, 2013-40 I.R.B. 287, that employer payment plans are group health plans that will fail to comply with the market reforms that apply to group health plans under the Affordable Care Act (ACA). For this purpose, an employer payment plan as described in Notice 2013-54 refers to a group health plan under which an employer reimburses for some or all of the premium expenses incurred for an individual health insurance policy or directly pays a premium for an individual health insurance policy covering the employee, such as arrangements described in Revenue Ruling 61-146, 1961-2 C.B. 25."

The notice indicates, however, that the decision has been made to allow "…transition relief from the assessment of excise tax under Internal Revenue Code (Code) Section 4980D for failure to satisfy market reforms in certain circumstances." The "relief" which is to be allowed applies to any employer which is not "…an Applicable Large Employer (ALE) under Code Section 4980(H)(C)(2) and Sections 54.4980(H-1(a)(4) and -2…(and) Medicare premium reimbursement arrangements…" Further, the notice provides that, as part of the "relief" which will be provided, qualifying employers will not be subject to "…the excise tax under Code Section 4980(D)…asserted for any failure to satisfy the market reforms by

employer payment plans that pay or reimburse employees for individual health policy premiums or Medicare Part B or Part D premiums (1) for 2014 for employers that are not ALEs for 2014, and (2) for January 1 through June 30, 2015 for employers that are not ALEs for 2015." Generally an Applicable Large Employer is an employer which employs fifty or more full-time employees or the equivalent of the same. It is indicated, however, that "[a]fter June 30, 2015, such employers may be liable for the Code Section 4980(D) excise tax." In addition, it is indicated that employers eligible for the relief "…are not required to file IRS Form 8928 (regarding failures to satisfy requirements for group health plans under Chapter 100 of the Code, including the market reforms) solely as a result of having such arrangements for the period for which the employer is eligible for relief."

IV. CURRENT STATUS

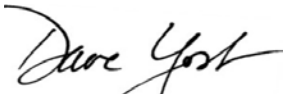
Part IV superseded by Bulletin 2017-02.

~~As is indicated above, after issuing a conflicting position, Federal authorities have concluded that any Ohio township which engages in the insurance reimbursement practices allowed under Ohio law render the township a group health plan for the purposes of the ACA. It is their contention that any such "plan" is in violation of certain standards imposed upon group plans by the act, and, therefore, that any township which continues to provide reimbursement is subject to financial penalty. Smaller employers (generally those employing fewer than fifty employees), and those providing reimbursement for Medicare Parts B and D premiums to eligible employees will be exempted from penalty for 2014 and for activities through June 30, 2015. It has been clearly indicated that it is the position of the Federal government that any such reimbursement practices in which a township engages from July 1, 2015, and thereafter may result in punitive, financial assessments.~~

~~Obviously, this matter is of very great concern to Ohio townships, many of which have a longstanding history of the reimbursement which Federal authorities now attempt to proscribe. In addition, the interpretation of the ACA which has been adopted, and the Federal position threatens the capacity of Ohio townships to provide or to assist in the provision of insurance coverage to many township employees and officers and members of their families. Township officials have a limited time to address these matters and to consider their options. Any modification of a township's reimbursement practices or provision of insurance coverage must be examined in light of the Ohio constitutional prohibition related to in-term increases or decreases in the compensation of township elected officials.~~

~~AOS will continue to monitor the situation and to provide information to stakeholders as it may become available to us. It has been indicated to AOS that some townships have been advised by their legal counsel to stop reimbursement practices and have done so while others continue to reimburse. In view of these facts, the UAN provision related to reimbursement will be maintained in the system at least through June 30, 2015, with further determination as to its existence to depend on developments in the interim. In addition, AOS has forwarded to Ohio Attorney General Mike DeWine a request for an opinion on a number of issues relevant to this situation with the additional request that, in view of the gravity of this situation and the limited timelines, he expedite his response. AOS will provide township officials with General DeWine's opinion as soon as it is available.~~

Questions concerning this Bulletin should be addressed to the Legal Division of the State Auditor's Office at (800) 282-0370.



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