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## Should Employers Change Their Plan Year to Delay Compliance with Health Reform Provisions?

Some insurance carriers are encouraging employers to change their policy years to December 1 through November 30, effective December 1, 2013 to delay complying with certain design requirements that apply to plan years beginning on or after January 1, 2014. It is important that employers considering changing their policy years consult counsel.

### What Health Reform Provisions Could be Delayed if the Policy Year is Changed?

The following provisions could be delayed:

- No more pre-existing conditions
- Waiting periods can't exceed 90 days
- No annual limits on essential benefits
- Mandated coverage levels/cost-sharing
- Coverage for approved clinical trials

It is important to note that the employer penalty applicable to large employers is effective January 1, 2014, regardless of plan year. Small groups may see the most benefit from a delay because under the mandated coverage levels, small, non-grandfathered, insured group health plans must offer essential benefits, limit deductibles (cannot exceed \$2,000/individual, \$4000/family), and provide a bronze level of coverage. Additionally, insurance carriers will be subject to

new underwriting rules with respect to small, insured groups. Instead of using experience rating (used to determine pricing of premiums for different groups or individuals based on the group's or individual's claims history), carriers will use community rating (which requires carriers to offer health insurance policies within a given territory at the same price to all persons without medical underwriting, regardless of health status). Rating variations will be restricted to (a) benefit coverage elected (plan and tier), (b) geographic area, (c) age, limited to a ratio of 3 to 1 for adults, and (d) tobacco use, limited to a ratio of 1.5 to 1.

### What is the Difference Between Plan Year and Policy Year?

For health care reform purposes, changing a policy year is not relevant; rather, the plan year is relevant. A plan year is an accounting period and is usually the same as the policy year (the period for which rates are locked in), but not always. If unsure of the plan year, employers can review the Summary Plan Description and/or Form 5500.

If the policy year is going to be changed, the plan year should also reflect the change. Any plan year change would have to be properly documented. Additionally, it may make sense to change other policy years and plan years of underlying benefit plans (for example, disability and life insurance plans) to maintain a consistent program.

## Is it Permissible to Change the Plan Year?

Currently, there does not appear to be any specific prohibition on changing the plan year; however, changing a plan year for the purpose of avoiding Federal law has been prohibited historically in various benefit contexts, including one provision applicable to health care reform. Specifically, under guidance issued under health care reform, for a health FSA, a short plan year may only be used for a valid business purpose which does not include delaying application of the \$2,500 limit. If a change in the plan year does not satisfy this valid business purpose requirement, the plan year for the cafeteria plan remains the plan year that was in effect prior to the attempted change.

When determining whether to change the plan year, it is also important to note that, when conducting IRS and DOL audits, senior agents and investigators have wide discretion in assessing and waiving penalties. They have been known to go much easier on employers that appear to be making honest efforts to comply; they are generally less inclined to be kind when plan sponsor are taking advantage of the flexibility they have with respect to operating and administering plans. Again, employers considering this change should consult an attorney.

