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TO: **Clients and Colleagues**
FROM: **Christine Roberts**
RE: **Nondiscrimination Rules for Insured Health Plans Put On Hold**
DATE: **January 5, 2011**

In late December 2010 the Internal Revenue Service issued Notice 2011-1, stating that compliance with nondiscrimination rules for insured group health plans, otherwise slated to go into effect on January 1, 2011 for non-grandfathered plans, will not be required (and no excise tax for failure to comply need be reported) until after regulations or other administrative guidance on the nondiscrimination rules issues. The Notice has the support of the other agencies that enforce health care reform, the Department of Labor and the Department of Health and Human Services.

Further, the Service anticipates that any such regulations or guidance will not apply until plan years beginning after a specified period following publication of the new guidance (often this is a 6-month period). Before the beginning of those plan years, employers will not need to file IRS Form 8929 reporting excise taxes as a result of plan designs that discriminate in favor of highly compensated individuals.

This is extremely welcome relief for plan sponsors and advisors. In essence, the Notice appears to bring back the status quo before the Patient Protection and Affordable Care Act by essentially stating that employers with insured health plans cannot realistically be expected to comply with laws that are "similar to" existing nondiscrimination rules for self-funded plans. For employers that maintained executive carve-out plans prior to the Affordable Care Act, maintenance of those plans in 2011 would not appear, from the Notice, to subject them to any enforcement efforts or excise taxes.

What does this mean for employers going forward? Employers who already redesigned their group health plan in anticipation of the January 1, 2011 compliance deadline should hesitate before rolling back any newly-compliant, nondiscriminatory plan designs. Reversing steps taken in order to comply with the law is never a good idea, and nondiscrimination rules eventually will apply so it is unwise to get re-attached to a plan design that ultimately will be obsolete, especially now that employees may be aware that discriminatory plan designs are disfavored. For employers with a discriminatory insured plan that was never redesigned, maintenance of the plan "as-is" should not result in any excise tax penalties or other enforcement action. Again, however, this grace period will end as of the first day of the plan year first following the year in which nondiscrimination regulations are published, and if regulations issue later this

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year then nondiscrimination compliance could be required as soon as January 1, 2012. Employers that are subsidizing former executives' COBRA or other continuation group health coverage through this year and into the next (e.g., under a severance plan) should be aware that maintenance of the plan into 2012 could violate the nondiscrimination rules and result in excise taxes.

As an indication of how complex the nondiscrimination issue is, the Notice requests further commentary from the public on no fewer than 13 different topics, ranging from "safe harbor" plan designs for automatic compliance, application of different rules for plans offered in different geographic regions by the same employer, what constitutes "benefits" for purposes of nondiscriminatory plan design (e.g., rate of employer contributions, versus percentage or amount of employee contributions), and whether compliance can be met merely by making coverage available to employees, whether or not they enroll (as applies in the 401(k) context). Notably, none of the requests for commentary refer to the transition period beginning with publication of the Notice, and ending with publication of final regulations on nondiscrimination rules for insured plans. This further confirms that, for pre-existing, discriminatory plans, we are entering a "no enforcement" zone for the immediate future at least.

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