



Seaton | Peters | Revnew

The Lawyers for Employers

Caitlin Gadel
Attorney at Law

Tel 952.921.4619
cgadel@seatonlaw.com

January 8, 2016

Santiago Hernández, MD
Chief Executive Officer
MediExcel Health Plan
750 Medical Center Court, Suite 2
Chula Vista, CA 91911

Re: 2016 MediExcel Health Plan Approval, Expatriate Health Coverage and Potential Employer Liability

Dear Doctor Hernández:

This letter summarizes MediExcel's 2016 approval from the California Department of Managed Health Care ("DMHC"), research regarding expatriate coverage and its application to the Patient Protection and Affordable Care Act ("PPACA"), and potential employer liability under the PPACA.¹

The Knox-Keene Health Care Service Plan Act of 1975, as amended, establishes the regulatory framework for overseeing health plan business in California under the DMHC. The DMHC regulates many of the health plans in California, including MediExcel's health plans. The DMHC requires all its licensee health plans to submit their 2016 Plan Year benefit plans and all associated documentation for review and approval for employer group coverage. Although the State of California governs MediExcel's licensure, it is the federal government that provides the regulatory framework for exceptions to certain PPACA rules and requirements for expatriate coverage. Therefore, a health plan approved by the DMHC does not automatically make that health plan compliant with the federal PPACA requirements. Additionally, some health plans may be licensed by the DMHC as "cross-border health care coverage" but do not qualify as expatriate plans under federal law.

On December 16, 2014, the Expatriate Health Coverage Clarification Act ("EHCCA"), buried in a large omnibus bill, was signed into law.² The EHCCA governs the treatment of expatriate

¹This letter uses "PPACA", as the federal government agencies do, to refer to the Patient Protection and Affordable Care Act, the Health Care and Education Reconciliation Act of 2010, and later laws that amended those laws. *See, for example*, 26 C.F.R. § 54.4980H-1(a)(3).

² Consolidated and Further Continuing Appropriations Act, 2015, Pub. L. No. 113-235 (Dec. 16, 2014), Division M Expatriate Health Coverage Clarification Act Of 2014.

plans under the PPACA beginning July 1, 2015, and sets forth the requirements that insurance plans, issuers of coverage, and enrolling employees must meet in order for coverage to be expatriate coverage and considered exempt from certain provisions and requirements of the PPACA.

The term ‘expatriate health plan’, as defined under the EHCCA, means a group health plan that meets standards including, but not limited to:

- A. Substantially all of the primary enrollees in a plan are qualified expatriates.
- B. Substantially all of the benefits provided under the plan or coverage are not excepted benefits.³
- C. The plan provides coverage for inpatient hospital services, outpatient facility services, physician services, and emergency services.
- D. The plan sponsor reasonably believes that the benefits provided by the expatriate health plan satisfy a standard at least actuarially equivalent to Minimum Value, as defined in I.R.C. § 36B(c)(2)(C)(ii).
- E. If the plan provides coverage of children, the plan makes such dependent coverage available for adult children until the adult child turns 26 years of age.
- F. The plan is issued by an expatriate health plan issuer that has a license to sell insurance in more than two countries, and
 - i. Maintains network provider agreements that provide for direct claims payments, directly or through third party contracts, with health care providers in eight or more countries;
 - ii. Maintains call centers, directly or through third party contracts, in three or more countries and accepts calls from customers in eight or more languages;
 - iii. Processes at least \$1,000,000 in claims in foreign currency equivalents each year;
 - iv. Makes available global evacuation/repatriation coverage;
 - v. Maintains legal and compliance resources in three or more countries; and
 - vi. Offers reimbursements for items or services under such plan or coverage in the local currency in eight or more countries.⁴

Under the EHCCA, the term ‘qualified expatriate’ means, among other things, an individual whose skills, qualifications, job duties, or expertise is of a type that has caused his or her employer to transfer or assign him or her to the United States for a specific and temporary purpose tied to his or her employment; or an individual who is working outside of the United States for a period of at least 180 days in a consecutive 12-month period that overlaps with the insurance plan year.

As we understand MediExcel’s health plans, the benefits you provide, and your employer client market, we agree with your assessment that MediExcel Health Plan’s coverage does not qualify as expatriate health coverage as defined by the EHCCA. MediExcel Health Plan’s enrollees do not work outside of the United States for a period of at least 180 days. MediExcel Health Plan is

³ Excepted benefits are defined in I.R.C. §9832(c).

⁴ Consolidated and Further Continuing Appropriations Act, 2015, Pub. L. No. 113-235 (Dec. 16, 2014), Division M Expatriate Health Coverage Clarification Act Of 2014 Sec. 3(d)(2).

licensed in only one (1) country (the United States). MediExcel Health Plan does not have network provider agreements in eight (8) countries. MediExcel Health Plan does not maintain call centers in three (3) countries. As a result, MediExcel Health Plan does not offer expatriate coverage.

For the benefit of your clients and their employees, it is prudent for MediExcel Health Plan to continue abide by all PPACA rules and regulations and to collect and pay all applicable PPACA taxes and fees including, but not limited to, the PCORI fees, reinsurance fees, and annual fee on health insurance providers. If a health plan does not qualify under the EHHCA as an expatriate plan, it must offer Minimum Essential Coverage, and, in certain circumstances, Minimum Value, to comply with federal rules and requirements. Non-compliance could result in a variety of fees and/or penalties not only for the insurance provider, but for an employer-client who purchases and participates in the non-compliant plan.

Under federal regulation, in order to be considered Minimum Essential Coverage, an employer-sponsored health plan must be offered within the large or small group in a state, and in California, it generally must be approved by the DMHC.⁵ MediExcel's 2016 large and small group plans have been approved by the DMHC. As a result, MediExcel's 2016 health plans provide Minimum Essential Coverage because they are employer-sponsored plans offered in the small and large group market within the State of California. As part of the approval process, MediExcel had to submit verification to the DMHC that their plans also provide Minimum Value, and MediExcel's plans would not have been approved if the plans did not provide Minimum Value.⁶ This is one example of MediExcel's commitment to abide by all rules and regulations of the PPACA.

Since 2014, Section 9010 of the PPACA, as amended, imposes an annual fee on health insurers (also referred to as covered entities) that provide health insurance to U.S. health risks. For 2014 and 2015, the IRS provided temporary relief for covered entities that provide expatriate plans.⁷ This relief generally allows a covered entity to pay a reduced fee for their expatriate plans. However, expatriate plans generally still had to pay a fee. In order to determine the appropriate fee, covered entities must report to the IRS the value of its net premiums using IRS Form 8963. The information submitted on IRS Form 8963 is not confidential. All information on IRS Form 8963 is open for public inspection. MediExcel appears on 2015 IRS list of covered entities that submitted Form 8963, providing yet another example of MediExcel's commitment to compliance.⁸ Insurance carriers, including carriers that issue expatriate plans, that are not on the list may have failed to properly comply with Section 9010 of the PPACA. The IRS issued different rules for the annual fee on health insurers for 2016 regarding expatriate plans.⁹

⁵ I.R.C. § 5000A(f)(2)(B).

⁶ See I.R.C. § 36B(c)(2)(C)(ii).

⁷ IRS Notice 2014-24.

⁸ To download a copy of the 2015 IRS data, see <https://www.irs.gov/Businesses/Corporations/Affordable-Care-Act-Provision-9010>.

⁹ IRS Notice 2015-43.

Lastly, it is important to keep in mind that expatriate plans do not exempt an employer from the PPACA Employer Mandate requirements.¹⁰ Employers of a certain size are required to offer affordable, Minimum Value, Minimum Essential Coverage to all full-time employees (and their dependents) or face a penalty.¹¹

While an expatriate plan offered to an expatriate (as defined under the EHHCA) will generally be assumed to satisfy many of the requirements under the Employer Mandate, an expatriate plan offered to a U.S. resident must actually meet all of the Employer Mandate requirements. As a result, some clients may face Employer Mandate penalties if they do not offer non-expatriate plans to their US resident employees. Lastly, expatriate plans are still subject to the upcoming tax on high-cost health coverage (the Cadillac Tax), and the new IRS employer reporting requirements.¹²

The federal government is allocating a number of resources to ensure employers maintain PPACA compliance. Employers should be aware of the potential vulnerability if they do not fully comply with the PPACA. The potential consequences could include fees, fines and penalties.

Seaton, Peters & Revnew, P.A. advises large and small employers across the country on PPACA compliance including on the issue of expatriate health coverage. There is still confusion regarding the definition expatriate health coverage leading some health coverage issuers to erroneously believe they are offering "expatriate health coverage" when in fact, they are not. This creates potential liability for both carrier and the employer clients.

If you have any employer clients that express concerns about expatriate health coverage status, Minimum Essential Coverage, Minimum Value, or compliance under the PPACA, please feel free to contact my office. My firm, Seaton, Peters & Revnew, P.A. (www.seatonlaw.com) dedicates its practice exclusively to advising and representing employers in labor and employment matters, including all matters relating to employee benefits and PPACA compliance. We have a nationwide practice covering virtually every industry, our clients range in size from Fortune 500 companies, small and family-owned businesses to trade associations. Many other firms include labor and employment law as part of a general practice or represent both employees and employers. However, our focus has always been, and will always be, on representing employers exclusively in labor and employment law matters.

Sincerely,



Caitlin M. Gadel, J.D.

¹⁰ I.R.C. §4890H.

¹¹ I.R.C. §4890H.

¹² I.R.C. §6055, 6056.