# IRS Chief Counsel Memorandum Affects Fixed Indemnity Plans and Wellness Plans Offered on a Pre-tax Basis

Employers have been increasingly offering so called ERISA voluntary benefits to their employees. One such benefit is a fixed indemnity offering which pays a set amount regardless of the cost of the service rendered. For example, $50 for each doctor's office visit regardless of the cost of the visit.

These voluntary benefits are generally offered on a post-tax basis. However, more and more we are seeing such benefits flow through the cafeteria plan which generally removes the plan from the ERISA voluntary plan safe harbor and makes it an ERISA plan. However, some courts have ruled that just because employees can pay for the voluntary benefit on a pre-tax basis, doesn't preclude it from being considered a voluntary benefit under ERISA's safe harbor. A definitive answer would be helpful and a recent IRS Chief Counsel Memorandum provides insight into the IRS' thinking on certain types of voluntary benefits.

IRS Chief Counsel Memorandum 201703013 adds another wrinkle. Employers permitting employees to utilize the cafeteria plan to pay for a fixed indemnity plan should take careful note of the last sentence in the conclusion section of the Memorandum - "An employer may not exclude from an employee's gross income payments under an employer-provided fixed indemnity health plan if the premiums for the fixed indemnity health plan were originally made by salary reduction through a §125 cafeteria plan."

The Memorandum provides five illustrative examples. The first three examples are the same fact pattern, the difference being whether premiums are paid on a pre or post tax basis or completely by the employer. Plan benefits paid attributable to post-tax contributions are not taxable while plan benefits paid with pre-tax or employer contributions are taxable. The fourth and fifth examples deal with wellness programs offering benefit payments such as $100 for completing a health risk assessment. Benefits payable are included in participant income because participation in the wellness programs requires contributions on a pre-tax basis.

The Memorandum discusses the interplay of IRC §106(a), 104(a)(3), 125 and a few other pertinent Code sections which form the basis for the conclusion.

Bottom line – payments from fixed indemnity health plans which are paid either completely by the employer or on a pre-tax basis by the employee are includible in employee's wages. The challenge is that such plans are often individual policies between the employee and the insurance company, the employer does not know the amount of benefits paid and therefore the amount of includible income to be taxed. Unanswered questions – will the employer be subject to under withholding penalties? Will the insurance company have to establish a reporting process to the employer of amounts paid under the plan? How will it be enforced? All questions which must be addressed.