**Affordable Care Act**

**Non Discrimination Provisions**

The Affordable Care Act (Act) imposes rules regarding the benefits that can be provided under the law. Generally, the provided benefits must be available to all covered employees and must not discriminate in favor of the highly compensated employees of the employer. The Act relies on established principles of determining discrimination so we have some guidance as to what will or will not be allowed. The following information should prove useful in determining whether a plan is in accordance with the Act or whether it may need to be modified.

Frequently Asked Questions:

Q1. What percentage of employees must be covered to avoid the definition of a discriminatory plan?

A1. A discriminatory plan does not provide benefits to at least 70% of all the employees of the plan or to at least 80% of all employees eligible to benefit under the plan (provided that at least 70% of all employees are eligible to benefit). In English, at least 70% of the employees must be eligible in order to pass this test.

Q2. What is the definition of a highly compensated employee for purposes of the Act?

A2. A highly compensated employee is defined as:

1. One of the five highest paid officers;
2. A shareholder that owns at least 10% of the stock of the employer; or
3. One of the highest paid 25% of employees not otherwise excluded.

Q3. Can any employees be excluded from the discrimination testing process?

A3. Yes. The following employees are excludable from the testing by law:

1. Employees who have not completed 3 years of service;
2. Employees who have not yet attained the age of 25; and
3. Part-time of seasonal employees.

Q4. Do these rules apply to both fully insured and self-insured plans?

A4. Yes, they do.

Q5. Can an employer split off the management and other highly compensated employees to a separate company to avoid the non-discrimination rules?

A5. Probably not. Employers are subject to the controlled group rules which generally require all companies owned by the same person or persons to be aggregated for the purpose of the non-discrimination testing. See separate section on the Controlled Group rules for additional information.

Q6. What are the consequences if a plan is found to be non-discriminatory?

A6. Under current rules, premiums and other expenses paid by the employer under a non-discriminatory plan are deductible to the employer and not taxable to the employee. Should a plan fail these rules, part or all of the premiums and expenses paid under the plan will likely be taxable to the employee.

You should contact your income tax advisor should you believe it possible your plan will be considered discriminatory.