REYMANN LAW GROUP, P.A.
LEGAL COMPLIANCE & REGULATORY SERVICES

January 27, 2024

Dear Sir or Madam,

I have been requested to act as tax counsel for Managed Health, LLC, a Wyoming Limited Liability Company, which markets solutions geared toward removing the complexities, under-utilizations, and high cost of healthcare. The purpose of this opinion is to address the potential tax issues for the Managed Health Plan, primarily regarding the taxation of the distributions and/or benefits to the Managed Health Plan participants.

For purposes of this opinion, we have assumed the authenticity of the Managed Health Plan documents that were submitted to me (the "documents"), as well as the genuineness of all signatures and the correctness of all representations made therein. I cannot and do not represent that I checked the accuracy or completeness of, or otherwise independently verified, any of the various statements of fact contained in such documents and in documents incorporated by reference therein. I have further assumed that there are no agreements or understandings contemplated therein other than those contained in the documents.

This Tax Opinion is not intended to be and should not be construed as legal or tax advice to any entity or individual other than Managed Health, LLC.

The Managed Health Plan

The Managed Health Plan (the "Plan") provides certain benefits for covered services, such as primary care visits, urgent care visits, prescriptions, and direct primary care/concierge medicine, as well as medical events, including, but not limited to health screenings, health risk assessment, risk resolution assessments, chronic screenings and other medically based engagement activities.

The Plan is a limited benefit plan that provides indemnity claim payments to employees upon the utilization of medical care as that term is defined in Internal Revenue Code ("Code") Section 213(d). **The significance of being an indemnity plan is that the risk of economic loss is shifted from the employer to the insurance company, whereas the risk of economic loss for a wellness plan is on the employer.** The Plan's premium payments are paid through the employer's Code Section 125 Compliant Program with pre-tax dollars

311 Park Place Boulevard, Suite 150
Clearwater, Florida 33759
Greg@ReymannLawGroup.com
813-497-1400

through salary reductions. It is important to note that the Plan is not a wellness plan as the Plan does not make cash payment or incentive payments to employees without the utilization of medical care.

Furthermore, the Plan is a complimentary healthcare plan that overlays and compliments a traditional healthcare plan. It is a self-funded employer sponsored plan that is funded by employees through a pre-tax payroll deduction. This payroll deduction represents the maximum claims for the policy year.

The goal of the Plan is to work seamlessly with other benefit plans, including HMOs, PPOs, FSAs, health saving accounts, and fully self-insured plans.

The issue that this letter will address is whether a participant enrolled in the Plan may receive Plan distributions or benefits on a non-taxable basis.

Payments and Benefits

The Plan is funded through a Code Section 125 cafeteria plan ("Section 125 cafeteria plan") salary reduction using pre-tax dollars. The purpose of the Plan is to assist with out-of-pocket medical costs through fixed indemnity payments. The Plan benefits are designed for health and disease prevention and qualify as reimbursable medical expenses under Code Section 213(d).

It is important that we first understand the Plan and how deductions are made and more specifically, how benefits are then distributed on a non-taxable basis. As noted above, the Plan is completely funded by employee participants through a Code Section 125 Compliant Program. The Plan has a set monthly fee, which is paid through salary reductions, meaning that this amount would not be subject to federal taxation, along with the cost for tax insurance.

The Managed Health Plan provides indemnity claim payments to employees upon the utilization of medical care as that term is defined in Code Section 213(d). The Plan offers unlimited virtual care for the employees' entire family, a prescription program with $0 co-pays on certain medications, and many other benefits.

The Plan is not a "wellness" plan. The Plan does not make cash payments or incentive payments to the employee without the utilization of medical care. Moreover, indemnity payments reimburse expenses for medical care or are paid to help offset unreimbursed qualified healthcare expenses that may be incurred by the employee. The Managed Health Plan's services are provided for treatment, diagnosis, mitigation, prevention,

or cure of disease, or for the purpose of affecting any structure of function of the body due to an injury or sickness.

Legal Analysis; IRS Memorandum 201719025

The tax issue with participant distributions or benefits is whether the receipt of some or all of the distributions/benefits are subject to taxation.

In addressing the taxation of the Plan benefits, reference is made to IRS Memorandums 201622031, 201703013, and 201719025, along with the long-standing Revenue Ruling 69-154 which describes the "excess benefit" rule. IRS memorandums are valuable given their guidance is furnished by the Office of Chief Counsel upon a request internally, such as a request from an IRS director, an area director, or responses to other questions which develop during a proceeding. The memorandums also state, "this advice may not be used or cited as precedent." In short, with the exception of IRS Memorandum 201719025 (further discussed below), the guidance from these memorandums and revenue rulings provide that the tax treatment of benefits paid under a plan depends on whether the premiums are paid on a post-tax or pre-tax basis. If the premium is paid on a post-tax basis, then the benefits are received free from tax. If the premiums are paid on a pre-tax basis, then the benefits could also be free from tax, if the amount paid under the plan does not exceed the individual's unreimbursed medical expenses. However, if the amount received under the plan is more than the individual's related unreimbursed medical expenses, then the "excess benefit" is taxable to the participant.

IRS Memorandum 201719025 deals specifically with the tax treatment of benefits from self-funded health plans. The legal focus of this memorandum is Code Section 104(a)(3) – Compensation for Injuries or Sickness, which states the following:

> *"(G)ross income does not include amounts received through accident or health insurance (or through an arrangement having the effect of accident or health insurance) for personal injuries or sickness (other than amounts received by an employee, to the extent such amounts (A) are attributable to contributions by the employer* which were not includible in the gross income of the employee, or (B) are paid by the employer)."*
>
> **See Section 1.105-1 for rules relating to the determination of the amount attributable to employer contributions.*

As discussed in Memorandum 201719025, under Situation 1, which is factually similar to the Plan, the Service provides that "the participants receive a payment for engaging in certain activities related to health, but the arrangement does not involve a risk of economic loss or fortuitous event. Accordingly, there is no insurance for federal income tax purposes."

The memorandum also notes in its conclusion that "amounts are included in income and wages for reasons including, but not limited to, one or both reasons listed below. As a result, the exclusion from gross income under section 104(a)(3) does not apply to the amounts received by the employees." One of the noted reasons is the following: "the employer-provided self-funded health plan does not involve insurance risk, and accordingly, is not insurance (nor does it have the effect of insurance) for federal income tax purposes including section 104(a)(3)."

Therefore, because there is no insurance risk, there can be no "risk-shifting," which is required for an arrangement to "have the effect of insurance". The Office of Chief Counsel concluded saying that "because the self-funded health plan is neither insurance nor does it 'have the effect of insurance', amounts received through the plan are not excluded from income under Section 104(a)(3) or from wages under section 3401(a)."

IRS Memorandum 201719025 is therefore very clear that an employer-provided self-funded health plan that does involve insurance risk, or has the effect of insurance, would therefore meet the exclusion from gross income under Code Section 104(a)(3).

To determine whether the Plan has the effect of insurance or insurance risk, it is necessary to view the Plan from a global view. We understand that the Plan assumes an inherent transfer of risk, as required by the IRS, due to the zero-dollar outlay by the employee for the visits, as well as the pharmacy benefits and similar types of other services. Furthermore, the premiums set forth by the Policy are assumed to be actuarially determined to cover the claim risk and meet certain medical loss ratio requirements, in addition to any surplus risk exposure. The Plan also provides an à la carte type of Minimum Essential Coverage for the employee as a supplement to employers. This insurance coverage meets the minimum requirement coverage under the Affordable Care Act. Accordingly, it appears that the Plan does have the effect of insurance that would be sufficient under IRS Memorandum 201719025 to meet the conditions of Code Section 104(a)(3).

In addition, Revenue Ruling 2002-3 addresses the situation in which an employer has an arrangement under which employees may reduce their salaries and have the salary reduction amounts used to pay health insurance premiums for the employees. This revenue ruling holds that the exclusions under sections 106(a) and

105(b) (and not section 104(a)) do not apply to amounts that the employer pays to employees to reimburse them for health insurance coverage that was excluded from gross income under section 106(a) (including salary reduction amounts pursuant to a cafeteria plan under section 125 that are applied to pay for such coverage).

Code Section 104(a)(3) employee contribution exclusion

As noted above, Code Section 104(a)(3) provides, in short, that amounts received through accident or health insurance are not included in gross income. The code section further notes that this is not applicable for amounts that "are attributable to contributions by the employer which were not includable in the gross income of the employee." Under the IRS memorandum discussed below, in the one paragraph that discusses Code Section 104(a)(3), the memorandum states that "(a) salary reduction under a Code Section 125 cafeteria plan is treated as an employer contribution, and not an employee contribution."

This statement does not appear to have backup from the IRS Treasury Regulations. Section 1.104-1(d) provides that "(i)f the employer and his employees contribute to a fund or purchase insurance which pays accident or health benefits to employees, section 104(a)(3) does not apply to amounts received thereunder by employees to the extent that such amounts are attributable to the employer's contributions." The regulation then notes that the rules for the determination of the amount attributable to employer contribution is under Section 1.105-1. **Under this regulation section, 1.105-1(d), under both (1) and (2) and under the Example, amounts paid by payroll deduction are attributable to employee contributions and therefore are excluded under the employee's gross income under 104(a)(3).** As noted, IRS memorandums represent guidance from the IRS, but may not have binding effect on the Internal Revenue Services, especially should there be a conflict with IRS regulations.

Amendment to the Tax Opinion; IRS Memorandum 202323006

This amendment to the Tax Opinion is provided due to the 2023 release of IRS Memorandum 202323006. An IRS memorandum constitutes guidance from the Office of Chief Counsel in response to technical or procedural questions that develop during a tax proceeding. The memorandum is advisory only and has no binding effect on the Internal Revenue Service.

The IRS memorandum has been presented as potentially having an impact on this opinion. In order to assess whether this memorandum has an impact, it is necessary to determine the basis for our opinion and the IRS memorandum.

311 Park Place Boulevard, Suite 150
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In short, this opinion concludes that it is reasonable to assume the Plan had the effect of insurance that would be sufficient under IRS Memorandum 201719025 to meet the conditions of Code Section 104(a)(3). IRS Memorandum 202323006 addressed whether wellness indemnity payments under an employer-funded fixed-indemnity insurance policy are includible in the gross income of the employee if the employee has no unreimbursed medical expenses related to the payment. Of significance is whether the Office of Chief Counsel applied the rationale used in this opinion, and if so, how was the rationale used?

With this in mind, IRS Memorandum 202323006 concluded that wellness indemnity payments under an employer-funded, fixed-indemnity insurance policy are includible in the gross income of the employee if there were no unreimbursed medical expenses related to the payment. In reaching this conclusion, the Office of Chief Counsel relied on its interpretations under Code Section 105(a), in addition to other statutes, including Code Sections 104(a)(2), 104(a)(4), and 104(a)(5), **but not Code Section 104(a)(3)**, **which is the key Code Section referenced in the IRS Memorandum 201719025 that was used in our conclusion that the Plan had the requisite effect of insurance.** Accordingly, and given that the application used in IRS Memorandum 202323006 fails to apply the rationale used in our Tax Opinion letter, we believe that our opinion continues to represent a more likely than not level of success.

Conclusion

As noted, the Managed Health Plan is not a wellness plan. The Plan is funded through a Section 125 cafeteria plan using pre-tax dollars through salary reductions. Without a transfer of risk, a health plan is not a true insurance product. **In this instance, the employer pays the insurance company a premium payment and the risk of loss is shifted from the employer to insurance company.** This means that the employer is not at risk of paying any additional amounts to the employee or insurance company, regardless of any specific qualified medical event incurred by the employee.

As with many tax situations, the facts determine the outcomes. As mentioned, the IRS Memorandum says that its advice may not be used or cited as precedent, but nonetheless its advice can be provided and used internally by the IRS. **Accordingly, we believe that the IRS Memorandum 201719025 gives this Tax Opinion a more likely than not level of success.**

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Disclaimer

This opinion relies upon our interpretation of the Internal Revenue Code and relevant accompanying IRS guidance. This is a limited scope opinion. This opinion is limited to the one federal income tax issue addressed in the opinion. Additional issues may exist that could affect the federal tax treatment of the manner that is the subject of this opinion, and the opinion does not consider or provide a conclusion with respect to any additional issues. With respect to any federal tax issues outside the limited scope of the opinion, the opinion was not written and cannot be used by the taxpayers for the purpose of avoiding penalties that may be imposed on the taxpayers.

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