

## STRICTER PENALTIES FOR GROUP HEALTH PLAN VIOLATIONS

Although the Internal Revenue Code imposes an excise tax on employers for failure to comply with various federal group health plan mandates (including, for example, IRC Sections 4980B, 4980D, 4980E and 4980G), the IRS has never provided a method for self-reporting the excise tax. Nor has the agency aggressively imposed any tax as part of its audit processes. As of January 1, 2010, both are going to change.

Last month, the Treasury issued final amendments to the Excise Tax Regulations, which include provisions for employers sponsoring group health plans to report and pay excise taxes when failing to fulfill certain federal group health plan mandates (unless corrected in a timely fashion). Penalties and interest will accrue for failure to file an excise tax return and pay the excise tax on or by the due date, unless failure is due to reasonable cause and not willful neglect. Other important rules apply.

Under these newly issued regulations, an excise tax is imposed on employers failing to comply with the requirements of:

- COBRA
- Group health plan requirements
  - HIPAA portability, access and renewability
  - HIPAA nondiscrimination based on health status
  - Genetic Information Nondiscrimination Act
  - Mental Health Parity Act
  - Newborns' and Mothers' Health Protection Act
  - Michelle's Law
- Health Savings Account employer comparable contribution rules
- Archer MSA comparable employer contribution rules

### EXCISE TAX, EXCEPTIONS AND LIMITATIONS

Under COBRA and the other group health plan requirements, the excise tax is generally \$100 a day for each individual affected during a period of noncompliance. The period of noncompliance for COBRA is measured from the date of the failure to the date when the failure is corrected, or the date six months after the last day of the otherwise applicable COBRA coverage period, whichever is earlier. For other group health plan requirements, noncompliance is measured from the date of the failure to the date when the failure is corrected.

The good news is that the tax code does provide certain exceptions and limitations on the amount of the excise tax. For example, for failures relating to COBRA and other group health plan requirements, the excise tax is not imposed where the failure to comply is not discovered when exercising reasonable diligence, or where the failure was due to reasonable cause and not willful neglect, and the failure is corrected opportunistically. Moreover, a failure is treated as corrected if undone retroactively to the extent possible, and the person affected by the failure is made whole; i.e., placed in a financial position as good as if the failure had not occurred. (Plan sponsors often successfully use such an approach to correct COBRA notice problems. For example, if delivery of a COBRA notice was overlooked until six months down the

road, a plan sponsor has options to make the person whole. Specifically, though the qualified beneficiary would have owed “X” amount in back COBRA premiums, the employer might choose to waive the COBRA premiums owed, retroactively reinstate coverage to the date of the qualifying event and allow the person to start paying COBRA premiums going forward for the remaining months of the continuation period. Such a corrective step avoids the compliance failure contemplated in the new excise tax reporting rules.)

The penalty for noncompliance with both the MSA and HSA comparable employer contributions is a tax equal to 35% of the aggregate amount contributed by the employer to either of these accounts of all employees within the calendar year. For failures relating to these comparable contribution requirements, the IRS has the authority to waive all or a portion of the excise tax to the extent the tax would be excessive relative to the failure involved. An employer, however, may cure noncomparable contributions for a calendar year by making additional contributions plus reasonable interest, not to exceed an employee’s annual contribution limit, until April 15 of the following year.

## **REPORTING AND DUE DATE**

An employer liable for the excise tax must report it by filing Form 8928, “Reporting of Certain Excise Taxes under Chapter 43 of the Internal Revenue Code.” Although a final version of Form 8928 is not available, its draft may be viewed on the [IRS website](#).

The excise tax and reporting date for failures relating to COBRA and other group health plan requirements generally are due on or before the due date for filing the employer’s federal income tax return. An extension to file the employer’s tax return does not extend the filing date for Form 8928. Multi-employer and multiple employer plans with failures must file on or before the last day of the seventh month after the end of the plan year.

The excise tax and reporting date for failures relating to MSA and HSA comparable employer contributions must be filed on or before the fifteenth day of the fourth month after the calendar year in which the noncomparable contributions were made.

## **EFFECTIVE DATE**

The excise tax reporting regulations are effective for any Form 8928 that is due on or after January 1, 2010. The comparable employer contribution regulations are effective for employer contributions made for calendar years beginning on or after January 1, 2010.

# KEY CONTACTS

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