



EMPLOYERS NOW REQUIRED TO SELF-REPORT CERTAIN GROUP HEALTH PLAN VIOLATIONS (AND PAY THE APPROPRIATE EXCISE TAX)

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*EFFECTIVE JANUARY 1, 2010, EMPLOYERS AND OTHER ADMINISTRATORS ARE NOW REQUIRED TO SELF-REPORT AND PAY EXCISE TAXES TO THE INTERNAL REVENUE SERVICE FOR FAILURE TO COMPLY WITH CERTAIN FEDERALLY MANDATED GROUP HEALTH PLAN REQUIREMENTS. WHILE THE PENALTIES FOR THESE VIOLATIONS ARE NOT NEW, THEY HAVE RARELY BEEN ASSESSED DUE TO LACK OF ENFORCEMENT. THIS **INSIGHTS** WILL IDENTIFY THE GROUP HEALTH PLAN REQUIREMENTS SUBJECT TO THE NEW SELF-REPORTING REGULATIONS, SUMMARIZE THE REPORTING RESPONSIBILITIES AND TAX LIABILITIES, AND OUTLINE STEPS THAT EMPLOYERS AND PLAN SPONSORS CAN TAKE TO HELP MITIGATE THE RISK OF BEING SUBJECT TO THE FEDERAL EXCISE TAX PENALTIES AND REPORTING REQUIREMENTS.*

LAWS SUBJECT TO AN EXCISE TAX FOR VIOLATIONS

The Internal Revenue Code imposes excise taxes on group health plan sponsors and administrators for certain violations of federal law. In accordance with final regulations issued in the fall of 2009, the responsibility now rests with employers and plan administrators to self-report violations and pay the appropriate excise tax. Beginning January 1, 2010, employers and plan administrators must report violations with respect to the following federal mandates:

- ◆ **COBRA Health Plan Continuation Requirements** – Plans that are subject to COBRA (20 or more employees) must comply with the notice and continuation of coverage requirements for qualifying events.
- ◆ **Health Insurance Portability and Accountability Act (HIPAA)** – Group health plans subject to HIPAA must comply with preexisting condition limitation, certification of creditable coverage and special enrollment requirements. It should be noted that

the special enrollment requirements were updated in April, 2009 to allow those who become or lose eligibility for Medicaid, 60 days to enroll in a group health plan.

- ◆ **HIPAA Nondiscrimination Requirements** – Group health plans subject to HIPAA must not discriminate based on a health status factor with respect to eligibility to enroll and premium contributions, except as allowed by HIPAA under a wellness program.
- ◆ **Genetic Information Nondiscrimination Act (GINA)** – Prohibits employers and health plan sponsors from using genetic information to discriminate against employees with respect to plan eligibility and contribution requirements.
- ◆ **Mental Health Parity and Addiction Equity Act** - Requires mental health and substance abuse benefits, if offered, be equivalent to the plan's medical and surgical benefits. This Act generally applies to group health plans sponsored by employers with 50 or more employees.
- ◆ **The Newborns' and Mothers' Health Protection Act** – Group health plans must guarantee minimum hospital lengths-of-stay for mothers and newborns.
- ◆ **Michelle's Law**- Requires group health plans to continue coverage to post-secondary student dependents under a parent's health plan for up to one year due to a medically necessary leave of absence.
- ◆ **Comparable Contribution Requirements** –Employers who help fund their employees' Health Savings Accounts (HSAs) are required to make comparable contributions to the HSAs and not discriminate in favor of highly compensated employees.

REPORTING RESPONSIBILITIES

Plan sponsors must report these violations and pay the appropriate tax on IRS Form 8928 (Return of Certain Excise Taxes Under Chapter 43 of the Internal Revenue Code). Form 8928 can be found on the IRS website at <http://www.irs.gov/pub/irs-pdf/f8928.pdf>. The form's

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instructions can be found at

<http://www.irs.gov/pub/irs-pdf/i8928.pdf>

The amount of the tax, based on the infraction, is as follows:

- ◆ **COBRA Health Plan Continuation Requirements** – \$100 per day per affected qualified beneficiary.
- ◆ **HIPAA, GINA, Mental Health Parity Act, Newborns' and Mothers', and Michelle's Law** – \$100 per day per affected individual.
- ◆ **Comparable Contributions** – 35% of the aggregate amount contributed to the HSA for all employees within the applicable calendar year.

An employer who uses an insurer or third party administrator to manage the COBRA or HIPAA process would not be held accountable to report these types of violations as the responsibility would rest with the vendor to report infractions and pay the appropriate excise tax.

THE DEADLINE TO FILE AND PAY THE TAX

In general, an employer must submit Form 8928 and pay the associated tax no later than the date the employer must file its federal income tax return. Comparable contribution violations, however, must be reported and the applicable tax paid no later than April 15th following the year in which the violation occurred. Other requirements apply to extension requests, multiemployer and multiple employer plans.

ALLOWABLE EXCEPTIONS

The IRS recognizes that certain failures may result in the normal course of operations and not as a result of willful neglect. Other than comparable contribution violations, the IRS will not impose an excise tax under the following circumstances:

- ◆ If it is established by the Secretary of the Treasury that no one liable for the tax knew, or exercising reasonable diligence would have known that the failure occurred, or
- ◆ If the failure was due to reasonable cause and not willful neglect and the failure is generally corrected within 30 days.

The IRS can waive the excise tax for comparable contribution violations if the Secretary of the Treasury believes the tax to be excessive and the failure is due to reasonable cause and not willful neglect.

FAILURE TO TIMELY REPORT AND PAY THE EXCISE TAX

Those who fail to report and/or pay the excise tax in a

timely fashion will be subject to penalty and interest charges as follows:

- ◆ **Penalty for Late Filing** – 5% of the unpaid tax for each month the return is late to a maximum of 25% of the unpaid tax. There is a \$100 minimum penalty for a filing that is more than 60 days late.
- ◆ **Penalty for Late Payment of Tax** – ½ of 1% of the unpaid tax for each month the tax is not paid to a maximum of 25% of the unpaid tax.
- ◆ **Interest** – May be charged on taxes and penalties not paid by the due date, even if an extension of time is granted.

ACTION STEPS

Plan sponsors should review group health plan compliance procedures to make sure that benefits personnel are familiar with these federal mandates and the new self-reporting requirements. Plan sponsors who self-administer COBRA, for example, must (i) issue the General Notice and Qualifying Event Notices in a timely fashion, (ii) track beneficiary payments, (iii) issue open enrollment materials, as necessary, and (iv) communicate with qualified beneficiaries when COBRA coverage ends. Employers should establish policies to correct problems that may arise in order to avoid costly errors. We will keep you apprised of new federal mandates that become subject to these self-reporting requirements in future editions of *Insights*.

ADDITIONAL INFORMATION

For specific questions concerning information contained in this *Insights*, please contact your Chernoff Diamond consultant.

Information contained in this *Insights* is not intended to render tax or legal advice. Employers should consult with qualified legal and/or tax counsel for guidance in respect of matters of law, tax and related regulation.

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