

MEMORANDUM

October 9, 2009

New Excise Tax Reporting in Effect January 1, 2010 for Violations of COBRA, HIPAA Portability, Other Group Health Plan Mandates and Final Regulations for HSA Comparable Employer Contributions

Failing to comply with various federal group health plan mandates, including COBRA and HIPAA portability, just got riskier and costlier for employers. Since the date of enactment of COBRA, HIPAA Portability and other federal mandates applicable to group health plans, the Internal Revenue Code has provided that employers are liable for excise taxes for failure to comply with such provisions. However, there had never been a method for self-reporting the excise tax, and the IRS had not historically imposed these excise taxes as part of an audit. With the publication of final regulations on excise tax reporting, effective January 1, 2010, employers who sponsor group health plans now will be required to report and pay excise taxes for failing to satisfy certain federal group health plan mandates, unless timely corrected. In addition, excise tax reporting is required if comparable employer contribution rules are not satisfied for health savings accounts ("HSAs") and Archer medical savings accounts ("MSAs"). 74 Fed. Reg. 45994 (September 8, 2009). Failure to file the excise tax return and pay the excise tax on or before the required due date will result, under Internal Revenue Code section 6651, in penalties and related interest unless the failure to timely file or pay is due to reasonable cause and not to willful neglect.

Which Group Health Mandates Are Covered?

Under Internal Revenue Code sections 4980B, 4980D, 4980E, 4980G, an excise tax is imposed on employers for failure to comply with the requirements of

- COBRA;
- HIPAA portability, access, and renewability;
- HIPAA nondiscrimination based on health status;
- Genetic Information Nondiscrimination Act ("GINA");
- Mental Health Parity;
- Newborns' and Mothers' Health Protection Act (minimum hospital stays for newborns and mothers);
- Michelle's Law (coverage of dependent students on medically necessary leaves of absence);
- Health savings account ("HSA") comparable employer contribution rules; and
- Archer MSA comparable employer contributions rules.

How Much Is the Excise Tax?

The excise tax varies depending on which law the employer or plan has failed to comply with. For failures relating to COBRA and group health plan requirements (HIPAA portability, HIPAA nondiscrimination, GINA, Mental Health Parity, Newborns' and

Mothers' Health Protection Act, and Michelle's Law), generally the excise tax is \$100 per individual to whom the failure relates per day for each day of noncompliance. For failures relating to the Archer MSA and HSA comparable employer contributions requirements, generally the excise tax is 35% of the amount contributed by the employer to the Archer MSAs or the HSAs of all employees within the calendar year.

Are there any Exceptions to the Excise Tax?

Yes. For failures relating to COBRA and group health plan requirements (HIPAA portability, HIPAA nondiscrimination, GINA, Mental Health Parity, Newborns' and Mothers' Health Protection Act, and Michelle's Law), the excise tax is not due where the failure to comply is not discovered when exercising reasonable diligence, or where the failure is due to reasonable cause – not willful neglect – and it is timely corrected. "Correction" means that the failure must be retroactively undone to the extent possible and that the person to whom the failure relates is placed in a financial position which is as good as he or she would have been in had the failure not occurred. For failures relating to the Archer MSA and HSA comparable employer contributions requirements, the excise tax may be waived in situations where the excise tax imposed is excessive relative to the failure involved. For failures relating to the HSA comparable employer contributions requirements, an employer may correct the failure by making additional HSA contributions to satisfy the comparability rules, plus reasonable interest, until April 15th following the calendar year in which the non-comparable contributions were made.

How Will the Excise Tax Be Reported?

Persons subject to the tax (see below) will report and pay the excise tax using IRS Form 8928, Return of Certain Excise Taxes Under Chapter 43 of the Internal Revenue Code.

Is Form 8928 Available?

Not yet. However, the Form 8928 may be seen in its draft form on the IRS website at <http://www.irs.gov/pub/irs-dft/f8928--dft.pdf>.

When Are the Excise Taxes and Form 8928 Due?

For failures relating to COBRA and group health plan requirements (HIPAA portability, HIPAA nondiscrimination, GINA, Mental Health Parity, Newborns' and Mothers' Health Protection Act, and Michelle's Law), the excise tax and Form 8928 generally are due on or before the due date for filing the person's (i.e., employer, insurer, third-party administrator) federal income tax return (without extension). (Generally, the employer will be responsible for paying and reporting the excise tax; however, for COBRA failures, an insurer or third-party administrator may, under certain circumstances, be responsible for paying and reporting the excise tax.) An extension to file the person's federal income tax return does not extend the date for paying the excise tax and filing Form 8928. For multiemployer plans and multiple employer health plans with failures

relating to COBRA and group health plan requirements, the return is due on or before the last day of the seventh month after the end of the plan year.

For failures relating to the Archer MSA and HSA comparable employer contributions requirements, the excise tax and Form 8928 are due on or before the 15th day of the fourth month following the calendar year in which the non-comparable contributions were made.

How Do the Final Regulations Impact Employers Who Contribute to HSAs or MSAs?

Also included in the regulations were the final rules on comparable employer contributions to HSAs. The final regulations were substantially similar to the proposed regulations issued in July 2008. The regulations provide final rules relating to (i) contributions to HSAs of nonhighly compensated employees, (ii) contributions to HSAs of highly compensated employees, and (iii) contributions to HSAs for employees who become eligible individuals mid-year.

When Is the New Final Regulation Effective?

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

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