



New Self-Reporting And Excise Tax Payment Requirements For Certain Health Plan Violations

Failure to comply with COBRA and other health and welfare plan rules can trigger heavy excise tax penalties. In the past, those penalties were rarely assessed and employers could quietly fix their own problems. Now, however, you may have to report your own problems and assess these taxes on yourself. On Sept. 8, 2009, the Internal Revenue Service (IRS) issued final regulations regarding new reporting requirements.

Starting in 2010, employers (and certain third parties) must self-report and pay excise taxes for failing to comply with the following:

- 1 COBRA
- 2 HIPAA portability, access, renewability and nondiscrimination rules
- 3 The Genetic Information Nondiscrimination Act (GINA)
- 4 Mental health parity rules
- 5 Minimum hospital stays under the Newborns' and Mothers' Health Protection Act
- 6 Continued group health plan coverage of postsecondary dependent children on a medically necessary leave of absence under Michelle's Law
- 7 Health savings account (HSA) comparable employer contributions rules
- 8 Archer medical savings account (MSA) comparable employer contributions rules

Affected parties must report the excise taxes on Form 8928, "Return of Certain Excise Taxes Under Chapter 43 of the Internal Revenue Code." Failure to file Form 8928 and pay excise taxes may lead to the imposition of penalties and interest. A draft form is available on the IRS Web site. www.Irs.gov

Excise tax amounts

The excise tax payable for each failure relating to items 1 through 6 above is generally equal to \$100 per day per affected person.

The excise tax for noncompliance with the rules relating to Archer MSA and HSA comparable employer contributions is generally equal to 35 percent of aggregate employer contributions made to all Archer MSAs or HSAs during the applicable calendar year.

When to file Form 8928 and pay excise taxes

For noncompliance with items 1 through 6 above, Form 8928 is due and the excise tax is payable:

For employers and third parties (such as insurers or third-party administrators, who may be responsible for reporting and paying excise taxes relating to COBRA failures), on or before the due date for filing the employer's or third party's federal income tax return. An extension to file the income tax return does not extend the date for filing Form 8928.

For multiemployer and multiple employer plans, on or before the last day of the seventh month after the end of the plan year. In both of the above cases, the return must reflect the portion of the noncompliance period for each failure that falls during the person's taxable year or the plan's plan year, as applicable. Generally, the noncompliance period begins on the day the failure first occurs and ends on the day the failure is corrected.

With respect to the excise tax for failure to make comparable contributions to Archer MSAs or HSAs, Form 8928 is due and the excise tax is payable on or before the 15th day of the fourth month following the calendar year in which the non-comparable contributions were made.

Late penalties and interest

Unless an exception described in the next section applies, penalties and interest will be assessed for failure to file Form 8928 and pay the excise tax on or before the due date.



New Self-Reporting And Excise Tax Payment Requirements For Certain Health Plan Violations Continued

Excise tax exceptions

For items 1 through 6 on first page, an excise tax does not apply:

For any period during which the responsible party did not know, or exercising reasonable diligence would not have known, that the failure existed.

If the failure is due to reasonable cause and not willful neglect, and is corrected within 30 days beginning on the first date the party otherwise liable for the tax knew, or exercising reasonable diligence would have known, that the failure existed. Correction means retroactively undoing the failure to the extent possible and placing the affected person in a financial position as good as he or she would have been in had the failure not occurred.

If the failure is due to reasonable cause and not willful neglect, in which case the excise tax may be partially or fully waived if it would be excessive relative to the failure involved.

If an employer fails to make comparable contributions to Archer MSAs and HSAs, the excise tax may be waived if the failure is due to reasonable cause and not willful neglect, and if the excise tax would be excessive relative to the failure involved.

Effective date

The excise tax reporting requirements apply for any Form 8928 due on or after Jan. 1, 2010. Generally, the rules are effective for taxable years of employers, plan years of multiemployer or multiple employer health plans, Archer MSA plan years or HSA employer contributions made for calendar years, beginning on or after Jan. 1, 2010.

Practice points

Employers should have procedures in place to identify potential excise tax issues; and relevant employees, such as human resources personnel, should be familiar with the excise taxes noted above. Employers should consider creating checklists of potential excise tax violations and periodically review the checklists.

For example, employers should work with their advisors or COBRA administrators to ensure that there are no COBRA violations.

Employers must also ensure that relevant employees are familiar with recent changes, such as:

The two new events under HIPAA permitting special enrollment in a group health plan for loss of eligibility for coverage, or entitlement to a state premium assistance subsidy, under Medicaid or a state child health plan. (Employers should watch out for model notices expected to be issued in 2010 regarding these new events, and should update the notice of special enrollment rights given to employees.)

Prohibitions under GINA against using genetic information for underwriting or certain other purposes. In particular, note that there may be violations of GINA if genetic information was obtained before, but used after, its effective date (such as information collected as part of a health risk assessment).

For more information please visit www.Irs.gov