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The New Excise Tax Penalties: Compliance is Your Best Defense

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Those of us who work in the group health benefits arena are quite familiar with the many federal laws regulating employer sponsored group health plans – COBRA, mental health parity, HIPAA, GINA, the Newborns' and Mothers' Health Protection Act, and Michelle's Law, to name a few. Each places requirements on the group health plan to provide coverage or continue coverage, or provide notice, special enrollment rights or protection from discrimination due to genetic information or the presence of a health factor. Compliance failure with any of these laws' highly specific requirements carries a per person, per day penalty burden for non-compliance instances. However, historically no mechanism has existed for the reporting or payment of a non-compliance penalty, other than as the result of a lawsuit or an IRS or DOL audit. Until now.

On September 8, 2009, the IRS issued final regulations that became effective for tax years beginning January 1, 2010, regarding new employer sponsored group health plan reporting obligations. Annually, every group health plan must determine if any non-compliance incidents reportable under the federal mandates occurred. If so, the party responsible for the non-compliance – be it TPA, HMO, insurance company or plan sponsor/employer – must self-report each non-compliance instance and proactively pay the associated penalties (26 CFR part 54, sections 4980b and 4980d). The reporting entity must use the new IRS reporting form 8928 (created specifically for this purpose) and file it at the same time as their other federal tax forms.

Reportable non-compliance incidents subject to excise tax penalty include failure to:

- Satisfy COBRA continuation coverage requirements;
- Comply with HIPAA limitations on pre-existing condition exclusions, certificates of creditable coverage, or special enrollment rights;
- Provide coverage for the mandated minimum length of hospital stays in connection with childbirth for mothers and newborns;
- Provide parity in mental health benefits and substance use disorder benefits ;
- Make comparable HSA contributions for all participating employees;
- Exercise non-discrimination regarding eligibility to enroll or premium contributions as required due to genetic information or health factors.

Each incident of non-compliance costs $100 per affected person per day, or if more than one person is affected by the failure, $200 per day. For instance, if a family doesn't receive their COBRA election notice in a timely manner, the excise tax penalty is $200 per family member, per number of days of non-compliance. On a wry note, the IRS does indicate the maximum penalty in any one year for a TPA, HMO or insurance company is $2 million USD.

What about waivers? Under the new reporting regulations, the possibility of a partial or full waiver exists in the following instances:

- If the plan did not, and by exercising reasonable diligence would not have known of the non-compliance.
- If the non-compliance was due to reasonable cause and not willful neglect, and the failure was fully corrected and the affected persons "made whole"

within 30 days of discovery.

- If the excise tax would be excessive relative to the nature of the non-compliance.

Unfortunately, as of this writing, there is no guidance on how a plan would apply for the waiver, and the IRS reporting form 8928 does not include the option to provide an explanation for the non-compliance.

While the new reporting requirements are too detailed to elaborate on in this article, the basics are here. To protect your plan, start a proactive discussion with your broker or Third Party Administrator to identify and address any potential problem areas. If you're an HMA client, be at ease. We'll be working with you to ensure your plans are fully compliant so the excise tax penalty is avoided.

Five Preventive Next Steps

1. Self-funded? Work with your broker or TPA to identify each new reporting requirement mandate and how it applies to your plan.
2. Ensure your plan document not only accurately reflects the mandated coverage or requirements, but also is administered accordingly.
3. Develop an Action Plan to address steps that help ensure continued compliance, identify time lines to meet each mandate, and guide your plan's administration.
4. Implement strong audit procedures to assure near-immediate identification of all failures.
5. Develop policies and procedures that assure corrective action for discovered failures occurs within the 30 day correction window. Document carefully! Show what you discovered and when, as well as the remediation steps.

Susan Smith has over 25 years experience in the employee benefits field, and is the Director of Human Resources and Compliance at HMA, a third party benefits administrator based in Bellevue, WA. She and her team are responsible for HMA's legal and legislative compliance, and they also assist HMA clients with Plan compliance questions and issues. HMA currently administers over 600 benefits plans and offers self-insured employers a full complement of benefit products and services. Contact: 800.869.7093, or proposals@accesstpa.com.