



Health Care Reform Update



IMPORTANT NOTICE REGARDING HEALTHCARE REFORM **Update #25** **September, 2013**

Excise Tax Penalties for Failure to Comply with Mandates of Health Care Reform

Recently the Department of Labor announced that employers will not be financially penalized for non-compliance with Affordable Care Act mandate requiring employers to provide employees a notice of coverage options through the Health Insurance Marketplace. Because of this announcement, we thought this an appropriate time to provide you with a general overview of the possible penalties for non-compliance with PHSA mandates incorporated into the Internal Revenue Code and the Retirement Income Security Act by the ACA.

The Affordable Care Act (ACA), as amended brings about insurance market reforms and other mandates via amendments to the Public Health Service Act (PHSA), the Internal Revenue Code (the Code), and the Employee Retirement Income Security Act (ERISA).

Many of PPACA's mandates are made in the form of amendments to the PHSA. As a result, the various PHSA mandates are applicable to group health plans and insurers subject to the Code, ERISA, and the PHSA through ERISA § 715 (which adds the new PHSA provisions to ERISA) and Code § 9815 (which adds the new PHSA provisions to the Code). While the substantive requirements are virtually identical, the consequences of noncompliance will differ because the enforcement mechanisms under the Code, ERISA, and the PHSA are different.

Note that while PHSA mandates do apply to state and local governmental plans the PHSA mandates that were incorporated into ERISA and the Code do not apply.

The three agencies (the DOL, IRS, and HHS) have said that they will be working with employers, issuers, states, providers, and others to support implementation; and their approach will emphasize assisting with compliance, as opposed to imposing penalties.

Excise Tax for Failure to Comply With Certain Code Provisions

Code § 4980D imposes an excise tax for a group health plan's failure to comply with certain requirements contained in the Code. Specifically, the tax applies to the requirements in Chapter 100 of the Code, which includes Code § 9815, the provision that incorporates the PHSA mandates of health care reform.

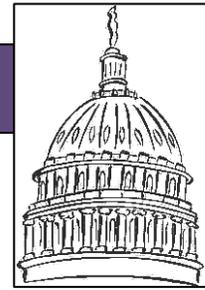
For single employer plans, this excise tax is imposed on the plan sponsor. Because the definition of "group health plan" in the Code excludes governmental plans, the excise tax does not apply to governmental plans. The tax also does not apply to insurers, since they are not mentioned in Code § 4980D. But because there is no exception for them, the tax does apply to church plans.

Failure to comply with a PHSA mandate will potentially trigger an excise tax of \$100 per day under the Code "with respect to each individual to whom such failure relates."

There are certain exceptions to the excise tax. The tax may not apply if the entity otherwise liable for the tax can demonstrate that it did not know (and, in exercising reasonable diligence, would not have known) that there was a compliance failure. Likewise, the tax may not apply if the entity can demonstrate that the failure was due to reasonable cause rather than willful neglect and was corrected within 30 days after the responsible entity first knew (or, in exercising reasonable diligence, should have known) that the failure existed. Note that key terms such as "reasonable cause," "willful neglect," and "reasonable diligence" are not defined—further guidance would be welcome. **Caution:** If discovered on audit, even reasonable cause failures will trigger certain minimum taxes.



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Code § 4980D also sets forth the minimum and maximum amount of excise taxes. The minimum excise tax for a compliance failure discovered after a notice of examination generally is \$2,500. The minimum excise tax is increased to \$15,000 if violations are “more than de minimis.” The maximum excise tax for “unintentional failures” for a single employer plan is the lesser of 10% of the amount paid during the preceding tax year by the employer for group health plans, or \$500,000.

The tax will not apply to certain small employers that provide health coverage solely by means of a fully insured plan through a contract with a health insurance issuer if the failure is solely caused by the health insurance coverage offered by the insurer. For this purpose, a small employer is one that employed an average of at least two but not more than 50 employees in the preceding calendar year and that employs at least two employees on the first day of the plan year. For multiemployer plans, the excise tax is imposed on the plan.

DOL Enforcement and Participant Lawsuits

Private-sector employers and group health insurers that do not comply with the PHSA mandates incorporated into ERISA are at risk for enforcement action by the DOL and for participant lawsuits. Because non-federal governmental plans and church plans are not subject to ERISA, these ERISA-based enforcement mechanisms do not apply to them.

DOL Enforcement

The DOL may bring a civil action against group health plans to enforce the PHSA mandates incorporated by reference into ERISA.

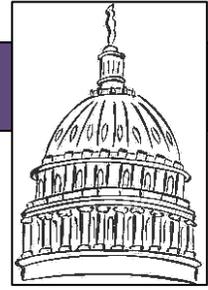
The DOL also may impose a civil penalty for failure to provide documents to the DOL upon request (for example, in response to an audit request). DOL audit letters received by employers include significant document requests addressing many compliance obligations for ERISA group health plans, including health care reform. The document request is generally tailored to specific situations and may vary depending on the focus of a particular investigation. Employers (or service providers) that receive this kind of request often have their work cut out for them, especially as the DOL often asks that materials be provided or made available on a relatively short turnaround. (Any extension of time should be negotiated early and documented carefully in writing.) The possibility of a DOL audit demonstrates that compliance alone is not enough—employers must have careful recordkeeping practices in place as well. Employers and advisors are wise to anticipate (and be prepared for) a DOL audit and related heavy document production requirements. For more information about DOL audits and the agency’s powers to request documents and enforce compliance, see Section XXXVII of ERISA Compliance for Health & Welfare Plans.

Participant Lawsuits

Participants, beneficiaries, and fiduciaries can file lawsuits under ERISA to enforce the PHSA mandates against private-sector group health plans and their insurers. Such lawsuits might include claims for payment of benefits alleged to be due under the plan, and the affected party could seek damages for unpaid benefits, interest, and attorney’s fees under ERISA § 502.



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HHS Penalties

Non-federal governmental plans and health insurance issuers are potentially subject to penalties for violations of the PHSA mandates. The PHSA civil money penalties of up to \$100 per day may be assessed against the issuer, the sponsoring employer of a non-federal governmental plan, and (in the case of a plan sponsored by more than one employer) the plan itself. Like the penalty under the Code, there are exceptions if the failure was not discovered with the exercise of reasonable diligence. And failures due to reasonable cause that are self-corrected within 30 days of the date the entity knew or should have known of the failure will not be subject to the penalty.

Bernie Lowe & Associates, Inc. is not providing any legal advice with regard to compliance with the requirements of the Affordable Care Act ("ACA"). Bernie Lowe & Associates, Inc. makes no representation as to the impact of plan changes on a plan's grandfathered status or interpretation or implementation of any other provisions of ACA. Bernie Lowe & Associates, Inc. will not determine whether coverage is discriminatory or otherwise in violation of Internal Revenue Code Section 105(h).