

New Excise Tax Reporting for COBRA Violations and Noncompliance with Other Health Plan Mandates

A new excise tax and reporting requirement makes it even more important to fix COBRA mistakes and other health plan and health savings account (HSAs) violations **within 30 days of discovering the error**. Until now, the IRS has not required plan sponsors to self-report the excise tax for such violations.

New Excise Tax Reporting

Sponsors of group health plans are now required to self-report and pay excise taxes for failure to satisfy COBRA requirements and other federal group health plan mandates. IRS Form 8928 with the applicable excise tax must generally be filed by the due date for filing the plan sponsor's federal income tax return (without extensions) for the year in which the failure occurs. Employers who fail to make comparable HSA contributions must file Form 8928 on or before the 15th day of the fourth month following the calendar year in which the noncomparable contributions were made (April 15). This reporting requirement is effective for returns due on or after January 1, 2010. Failure to file Form 8928 and pay excise taxes may result in penalties and interest. There are certain exemptions for the excise tax for small employers, governmental plans and church plans.

In addition to COBRA, the reporting requirement applies to excise taxes incurred for noncompliance with HIPAA portability (including issuing creditable coverage certificates, limits on pre-existing conditions, special enrollment), limits on the collection and use of genetic information under the Genetic Information Nondiscrimination Act (GINA), mandates for pediatric vaccines, mandates such as mental health parity, minimum hospital stays for newborns and mothers, continued group health plan coverage of postsecondary dependent children on a medically necessary leave from school under Michelle's Law, and HSA comparable employer contribution rules.

Excise Tax Amount

The excise tax varies based on the type of violation. Employer contributions to employee HSAs that don't satisfy comparability rules are subject to a 35% excise tax of the aggregate amount contributed by the employer to all employees within the calendar year. The excise tax for COBRA violations and other group health

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plan failures is generally \$100 per day per affected individual during the "noncompliance period." The noncompliance period for COBRA violations starts on the date of the failure and continues until the earlier of the date the failure is corrected, or at the latest, the date that is six months after the maximum period of coverage that would apply to the qualified beneficiary. With respect to other health plan violations, the "noncompliance period" continues until the failure is corrected.

For COBRA, the excise tax is assessed per qualified beneficiary, but is limited to \$200 for the total number of qualified beneficiaries in a family. The excise tax is assessed **in addition to** any ERISA penalties for late notices. There is also a per plan, per year limitation for violations due to reasonable cause and not to willful neglect that is the lesser of \$500,000 or 10% of the aggregate paid by the employer in the prior year for group health plans. This cap applies to COBRA violations and to other health plan violations. There is a similar limitation for multiemployer plans.

Relief for Inadvertent Errors

1. **Inadvertent Errors.** With respect to COBRA and other applicable health plan requirements, the excise tax will not apply during any period that the responsible entity didn't know of the failure, or by exercising reasonable diligence would not have known of the failure. The IRS has not yet provided examples of how this exemption may apply.
2. **Grace Period for Correction.** The tax also does not apply to cases where the failure was due to "reasonable cause" and not "willful neglect," and was corrected within 30 days of the date the responsible entity knew or, by exercise of reasonable diligence, should have known of the failure. Form 8928 has a separate line to report that the failure was not discovered despite due diligence or was corrected within the correction period.
3. **Definition of Correction.** A failure is treated as corrected if the failure is retroactively undone to the extent possible, and the qualified beneficiary is placed in a financial position comparable to the position he or she would have been in had the failure not occurred.

The IRS may waive part or all of the excise tax to the extent that payment of the tax would be excessive relative to the failure involved. This applies only to failures due to reasonable cause and not due to willful neglect.



Compliance Suggestions

Plan sponsors should adopt and follow procedures for compliance with these laws. For example, many plan sponsors outsource a large portion of their COBRA administration. However, a COBRA compliance failure often originates because the employer has not notified the COBRA administrator that a qualifying event has occurred. A common example is where an employer fails to realize that an employee on a medical leave of absence that extends beyond the FMLA period has ceased to satisfy the service requirement to maintain eligibility and should be offered COBRA. Therefore, it is very helpful to have COBRA procedures in place to make sure, for example, that the proper notices are delivered on a timely basis for leaves of absence and employment terminations.

Plan sponsors also may want to periodically review a checklist that identifies each specific compliance requirement and the entity responsible. This checklist should be updated regularly for changes in the law, such as the new HIPAA special enrollment events for entitlement to a state premium assistance subsidy under Medicaid or a state child health plan.

Use of regular compliance procedures and checklists may be helpful in proving that a compliance failure was due to "reasonable cause" (e.g., human error in following an established procedure) rather than "willful neglect" (e.g., ignoring compliance obligations). When an error is discovered, the error should be corrected as soon as possible, but no later than 30 days after discovery. Documentation of the correction should be retained in plan files.

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