



IRS Guidance Requires Group Health Plan Excise Tax Reporting in 2010

Beginning in 2010, employers that fail to comply with COBRA, HIPAA and other federal group health plan mandates will have to file an excise tax return. Recent IRS guidance indicates that these taxes must be reported on Form 8928 and paid on or before the due date (without extension) of the employer's federal income tax return. The guidance also clarifies HSA comparability rules in light of 2006 law changes.

Background

The Internal Revenue Code imposes excise taxes on employers for failing to comply with various federal group health plan mandates, including COBRA, the HIPAA portability and nondiscrimination rules, the Genetic Information Nondiscrimination Act (GINA), Mental Health Parity and Addiction Equity Act (MHPAEA), the Newborns' and Mothers' Health Protection Act (NMHPA), Michelle's Law, and the comparable employer contribution rules applicable to health savings accounts (HSAs).

The amount of the excise tax is generally \$100 per individual for each day of noncompliance. However, for noncompliance with the HSA comparable employer contribution requirements, the excise tax is generally equal to 35% of all employer contributions made to all HSAs during the applicable calendar year. Until now, the IRS has generally not assessed these taxes as part of an audit or required employers to report noncompliance.

In July 2008, the IRS proposed regulations requiring excise taxes to be reported on Form 8928 and recently issued these [regulations](#) in final form. Thus, effective January 1, 2010, employers that sponsor group health plans will be required to report and pay excise taxes for failure to comply with the various federal group health plan mandates. In light of 2006 statutory changes, the final regulations also clarify HSA comparability rules, including on contributions for mid-year plan entrants and the allowance for certain higher-paid employees. This guidance is substantially similar to that proposed last year. (See our July 30, 2008 [For Your Information](#).)

The Reporting Requirement

Plan sponsors must report the applicable excise tax on IRS Form 8928 (Return of Certain Excise Taxes Under Chapter 43 of the Internal Revenue Code), and pay the tax when reported. Penalties and interest may be assessed for failure to do so.

BUCK COMMENT. *Although Form 8928 is not yet available, a [draft form](#) is available on the IRS website.*

When to Report. For noncompliance with COBRA, the HIPAA portability or nondiscrimination rules, GINA, MHPAEA, NMHPA, and Michelle's Law, Form 8928 and any excise tax generally are due on or before the due date (without extension) of the employer's federal income tax return. For COBRA failures, the insurer or third-party administrator may be responsible for paying and reporting the excise tax in certain circumstances. If so, the tax is due on or before the due date (without extension) of the insurer's or administrator's federal income tax return. For multiemployer plans and multiple employer health plans, the return is due on or before the last day of the seventh month after the end of the plan year. For noncompliance with the HSA comparable employer contribution requirements, the excise tax and Form 8928 must be filed on or before the 15th day of the fourth month following the calendar year in which the noncomparable contributions were made.

How to Report. The return must be filed at the place specified in the IRS forms and instructions. The return, including any statements or other documents required to be filed, must be signed by the person required to file, or by the persons required or authorized to sign.

Exceptions to the Reporting Requirement. Self-reporting and the excise tax for failure to comply with COBRA, GINA and certain other requirements will not be required when the responsible party did not know of the failure despite the exercise of reasonable diligence or when the failure is due to reasonable cause and is promptly corrected in a manner that makes the affected beneficiary whole.

Comparable Employer Contribution Requirements

Employers that provide health savings accounts must make comparable contributions to the HSAs of all comparable participating employees to avoid the excise tax. Because this requirement does not apply to employers that give employees the opportunity to contribute through cafeteria plans, the following guidance is of limited application.

Contributions to HSAs of Nonhighly Compensated Employees. The final regulations incorporate the 2006 law change that allows, but does not require, an employer to make greater contributions to the HSAs of nonhighly compensated employees than to the HSAs of highly compensated employees with comparable coverage. For this purpose, highly compensated employees are those who own at least 5% of the entity or receive compensation from the employer in excess of certain thresholds (e.g., more than \$110,000 in 2009 indexed for inflation or, if elected by the employer, in the top 20% of employees based on compensation). The regulations further provide that an employer may make larger HSA contributions for employees with self plus two high-deductible health plan (HDHP) coverage than employees with self plus one coverage, even if the employees with self plus two are all highly compensated and the employees with self plus one are nonhighly compensated.

HSA Contributions for Mid-Year Eligible Employees. The regulations permit, but do not require, an employer to contribute up to the maximum annual contribution amount for the calendar year to the HSAs of all employees who are eligible individuals during the last month of the employees' taxable year, including mid-year eligible individuals (i.e., employees who became eligible after January 1 of the calendar year, and eligible individuals who

were hired after that date). An employer that makes the full annual contribution to any mid-year eligible individual's HSA must do so consistently for all comparable participating employees who are mid-year eligible individuals. The employer cannot make only a pro-rata contribution for some mid-year hires (i.e., based on the actual number of months of eligibility) and a full contribution for other mid-year hires.

Qualified HSA Distribution Rules. The regulations provide special comparability rules for qualified HSA distributions contributed to HSAs on or after December 20, 2006 and before January 1, 2012. A qualified HSA distribution is a direct distribution of an amount from a health flexible spending arrangement (FSA) or health reimbursement arrangement (HRA) to an HSA that does not exceed the lesser of the balance in the FSA or HRA on September 21, 2006 or on the date of distribution.

An employer that limits qualified HSA distributions from a health FSA or HRA to employees enrolled in its own HDHP does not have to offer qualified HSA distributions to employees who are eligible individuals but are not covered under its HDHP. If it does not impose this type of limit, it must offer qualified HSA distributions to all employees who are eligible individuals under any HDHP.

Effective Dates

The excise tax reporting regulations apply for any Form 8928 due on or after January 1, 2010, and the HSA comparable employer contribution regulations apply to employer contributions made on or after January 1, 2010.

Conclusion

To minimize excise tax liability, plan sponsors should ensure that they have procedures in place to identify compliance problems and resolve them. Because plan sponsors may be liable for excise taxes on certain outsourced functions, they should also consider a review of their vendor contracts and performance at this time.

The final regulations on comparability are substantially similar to the proposed regulations and are of interest mainly to those who do not provide employees the opportunity to make HSA contributions through a cafeteria plan.

Buck's consultants would be pleased to discuss this latest guidance and the excise tax reporting requirements with you, and assist in your compliance efforts.

This FYI is intended to provide general information. It does not offer legal advice or purport to treat all the issues surrounding any one topic.