HONIGMAN

Employee Benefits Alert

May 28, 2010

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Client Notice Regarding Self-Reporting Obligations for Welfare Plan Violations

Effective for Plan years beginning on or after January 1, 2010, Employers, Plan Sponsors and Plan Administrators must report to the IRS for certain welfare plan failures.

Reportable Plan Failures

Employers, Plan Sponsors and Plan Administrators must report these plan failures to the IRS:

- Failure to provide coverage for pediatric vaccines at least equal to coverage provided as of May 1, 1993
- COBRA continuation coverage failures
- HIPAA pre-existing condition, certificates of creditable coverage, special enrollment, guaranteed renewability and health-status related discrimination failures
- Mothers and Newborns Health Protection Act failures
- Michelle's law failures
- Mental health parity failures
- Comparable contribution failures to Archer MSAs
- Comparable contribution failures to HSAs

Excise Tax

The IRS will impose an excise tax for failure to report the listed violations. The amount of the excise tax is as follows:

- For COBRA failures, $100/day for each qualifying event failure, $200/day if the failure occurred with respect to two or more qualified beneficiaries
- For all other non-MSA and non-HSA failures, $100/day for each individual affected
- For MSA and HSA failures, 35% of the aggregate amounts contributed in the calendar year

- Failures due to reasonable cause, not willful neglect, and not corrected before an IRS audit letter is sent, will be subject to a minimum excise tax of $2,500 per qualified beneficiary for *de minimus* failures; otherwise $15,000 per qualified beneficiary

The IRS will not impose an excise tax if:

- No one liable knew or should have known of the failure
- The failure was corrected within 30 days of discovery

A failure is treated as corrected if it is retroactively undone, to the extent possible, and the qualified beneficiary is placed in the same financial position as if the failure had not occurred.

The IRS has implemented the following limitations on the excise tax:

- The total tax payable by TPAs, HMOs, and insurers cannot exceed $2 million for all plans administered in the same tax year
- The total tax payable by single employer plans is the lesser of 10% of the aggregate amount paid or incurred under the GHP in the prior tax year or $500,000
- All or part of the tax may be waived for reasonable cause failures where the penalty to be imposed is deemed excessive relative to the failure involved

Reporting the Excise Tax

The excise tax due is to be reported on IRS form 8928 as follows:

- On or before filing date for the federal income tax returns for COBRA, HIPAA, Mothers and Newborns and Mental Health Parity failures
- On or before the 15th day of the fourth month following the calendar year in which the non-comparable contributions were made for Archer MSA and HSA failures

The IRS has imposed penalties for late tax payment or late return filings, as follows:

- Interest is charged on taxes not paid by the due date, even if time for an extension is granted.

- If the return is filed late, penalties of 5% of the unpaid tax due each month or part of a month up to 25% will be owed. The minimum penalty is the smaller of $100 or the tax due if the return is filed more than 60 days late, but the penalty can be waived if reasonable cause is shown.
- If the tax is paid late (even if the return is filed timely), the penalty is ½ of 1% of the unpaid tax for each month or part of a month late, up to 25% of the unpaid tax. The penalty can be waived if reasonable cause is shown.

Statute of Limitations

There is a 3-year status of limitations with respect to the imposition of the excise tax, if the IRS is notified. If the employer corrects a failure within the 30-day period, and therefore, believes that it does not have to pay an excise tax, it should, nevertheless, file Form 8928 to report the failure and its correction so as to start the 3-year clock. This will provide a measure of security against the tax being imposed should the IRS find fault with the correction methodology. If the IRS is not notified of the corrections, it can audit at any time.

If you have any questions or need assistance in this matter, please contact any of the attorneys listed on this Employee Benefits Alert.