

COMPLIANCE OVERVIEW

Provided by Rose Street Advisors

Excise Taxes for Group Health Plan Violations

Group health plans are responsible for compliance with a number of federal laws. If a group health plan does not comply with certain group health plan requirements, including certain reforms under the Affordable Care Act (ACA), the employer maintaining the plan may be subject to an excise tax under the federal Internal Revenue Code.

The excise tax for group health plan violations is generally **\$100 per day**, per individual, per violation, subject to certain minimum and maximum amounts. However, there are some exceptions to the excise tax for group health plan violations. Any applicable excise taxes must be reported on IRS Form 8928, "Return of Certain Excise Taxes under Chapter 43 of the Internal Revenue Code."

Employers are also subject to an excise tax if they do not satisfy comparable contribution rules for health savings accounts (HSAs) and Archer medical savings accounts (MSAs).

LINKS AND RESOURCES

- [IRS Form 8928](#) "Return of Certain Excise Taxes under Chapter 43 of the Internal Revenue Code"
- [Instructions](#) for IRS Form 8928
- [IRS Form 7004](#) "Application for Automatic Extension of Time to File Certain Business Income Tax, Information and Other Returns"

HIGHLIGHTS

EXAMPLES OF VIOLATIONS

The excise tax may be triggered for violations of these laws:

- COBRA coverage
- Mental health parity
- HIPAA special enrollment
- Coverage for adult children
- HSA comparability rules

EXCEPTIONS

- Failures not discovered when exercising reasonable diligence
- Failures due to reasonable cause that are corrected within 30 days
- For small employers with insured health plans, failures related solely to health insurance coverage offered by the insurer

This Compliance Overview is not intended to be exhaustive nor should any discussion or opinions be construed as legal advice. Readers should contact legal counsel for legal advice.



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GROUP HEALTH PLAN REQUIREMENTS

Violations Triggering the Excise Tax

Generally, an excise tax of **\$100 per individual, per day** will apply to violations of the following rules.

Group Health Plan Requirements

- Continuation coverage (COBRA);
- Portability and nondiscrimination for health coverage (HIPAA);
- Genetic information nondiscrimination (GINA);
- Parity between mental health benefits and medical/surgical benefits (Mental Health Parity and Addiction Equity Act);
- Minimum hospital lengths of stay in connection with childbirth (Newborns' and Mothers' Health Protection Act);
- Reconstructive surgery after mastectomy (the Women's Health and Cancer Rights Act); and
- Continued coverage for post-secondary students with a serious medical condition (Michelle's Law).

In addition, the \$100 per individual, per day excise tax may be triggered by a violation of any of the following ACA requirements for group health plans:

REQUIREMENT	COMPLIANCE DATE	AFFECTED GROUP HEALTH PLANS
Coverage for adult children up to age 26	Plan years beginning on or after Sept. 23, 2010 (limited exemption for grandfathered plans for plan years prior to Jan. 1, 2014)	Health plans offering dependent coverage
No lifetime or annual limits on the dollar value of essential health benefits (EHB)	For lifetime limits, plan years beginning on or after Sept. 23, 2010. For annual limits, plan years beginning on or after Jan. 1, 2014 (restricted annual limits were allowed from 2010-2013)	All health plans Exceptions apply for integrated HRAs and FSAs offered under a cafeteria plan. These plans are not subject to the prohibition on annual limits.

REQUIREMENT	COMPLIANCE DATE	AFFECTED GROUP HEALTH PLANS
No coverage rescissions, except in cases of fraud or intentional material misrepresentation	Plan years beginning on or after Sept. 23, 2010	All health plans
No pre-existing condition exclusions	Plan years beginning on or after Sept. 23, 2010, for enrollees under age 19 Plan years beginning on or after Jan. 1, 2014, for all other enrollees	All health plans
Coverage of preventive health services without cost-sharing	Plan years beginning on or after Sept. 23, 2010	All non-grandfathered health plans (certain exceptions apply to the contraceptive coverage mandate)
Patient protections (designation of primary care provider, designation of pediatrician as primary care provider, patient access to obstetrical and gynecological care and improved access to emergency services)	Plan years beginning on or after Sept. 23, 2010	Non-grandfathered health plans
Improved internal claims and appeals process, including external review requirements	Plan years beginning on or after Sept. 23, 2010	Non-grandfathered health plans

REQUIREMENT	COMPLIANCE DATE	AFFECTED GROUP HEALTH PLANS
<p>Uniform summary of benefits and coverage (SBC) requirement</p> <p>(The ACA also establishes a penalty of up to \$1,000 for each willful failure to provide the SBC. Effective Aug. 1, 2016, this penalty amount increases to up to \$1,087 for each failure to provide the SBC, for violations that occur after Nov. 2, 2015.)</p>	<p>First open enrollment period beginning on or after Sept. 23, 2012, for participants enrolling during open enrollment</p> <p>For other participants, first plan year beginning on or after Sept. 23, 2012</p>	All health plans
No waiting periods in excess of 90 days	Plan years beginning on or after Jan. 1, 2014	All health plans
Nondiscrimination rules for fully insured health plans	<i>Effective date is delayed until guidance is released</i>	Non-grandfathered, fully insured health plans
Limits on cost-sharing (out-of-pocket maximum for EHB)	Plan years beginning on or after Jan. 1, 2014	Non-grandfathered health plans
Coverage for approved clinical trials	Plan years beginning on or after Jan. 1, 2014	Non-grandfathered health plans
No discrimination based on health status (including rules for wellness programs)	Plan years beginning on or after Jan. 1, 2014	Non-grandfathered health plans (final regulations on wellness plans apply to both non-grandfathered and grandfathered health plans)
Comprehensive health insurance coverage (EHB requirement)	Plan years beginning on or after Jan. 1, 2014	Non-grandfathered insured health plans in the small group market
No discrimination against health care providers acting within the scope of their license	Plan years beginning on or after Jan. 1, 2014	Non-grandfathered health plans

In addition, the IRS has issued guidance (including these [FAQs](#)) addressing the consequences for employers that do not establish a group health insurance plan for their own employees, but instead help

their employees pay for individual health insurance policies. These arrangements are known as “**employer payment plans.**” Because these employer payment plans do not comply with the ACA’s market reforms, the IRS has indicated that these arrangements may trigger the \$100 per individual, per day excise tax.

Amount of Excise Tax and Exceptions

The excise tax for group health plan violations (including the ACA’s market reforms) is generally **\$100 per day, per individual, per violation**, subject to the following minimum and maximum amounts:

- ✓ If a compliance failure is discovered by the IRS on audit, the minimum excise tax is generally \$2,500. However, if the violations are significant, the minimum excise tax increases to \$15,000.
- ✓ For single employer plans, the maximum excise tax for unintentional failures is the lesser of 10 percent of the aggregate amount paid by the employer during the preceding tax year for group health plan coverage, or \$500,000.

There are some exceptions to the excise tax for group health plan violations. The excise tax may not apply if the failure is not discovered when exercising reasonable diligence, or if it is due to reasonable cause and is corrected within 30 days after the entity knew (or in exercising reasonable diligence, should have known) that the failure existed. A failure is corrected if it is retroactively undone to the extent possible and the affected beneficiary is placed in a financial position as good as he or she would have been in if the failure had not occurred.

In addition, small employers with insured health plans may be exempt from the excise tax for certain failures if the violation was solely because of the health insurance coverage offered by the insurer. A small employer for this purpose is an employer with an average of 50 or fewer employees on business days during the preceding calendar year.

Reporting and Paying Excise Tax

Any applicable excise taxes must be reported on IRS [Form 8928](#), “Return of Certain Excise Taxes under Chapter 43 of the Internal Revenue Code.” [Instructions](#) for Form 8928 are also available.

The due date for paying the excise tax is the same as the due date for filing Form 8928. That due date will depend on what type of violation has occurred and the entity responsible. The due date for IRS Form 8928 may be automatically extended for six months by filing a completed IRS [Form 7004](#) “Application for Automatic Extension of Time to File Certain Business Income Tax, Information and Other Returns” and paying the estimated tax. The extension does not extend the time for paying any tax due.

RULE(S) VIOLATED	RESPONSIBLE ENTITY	DUE DATE
Group Health Plan Requirements	Employer, insurer, third-party administrator	On or before the due date for the entity’s federal income tax return (without regard to extensions)

Group Health Plan Requirements	Multi-employer or some multiple-employer health plans	On or before the last day of the seventh month after the end of the plan year
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COMPARABLE CONTRIBUTION RULES

An employer that fails to make comparable HSA or Archer MSA contributions for a calendar year is subject to an excise tax on all HSA (or Archer MSA) contributions that the employer makes for that year. The excise tax will generally be **35 percent of the amount contributed by the employer** to the HSAs (or Archer MSAs) of all employees for the applicable calendar year.

Employers liable for the 35 percent excise tax on non-comparable HSA or Archer MSA contributions must pay the tax and file Form 8928 by **April 15** following the calendar year in which the non-comparable contributions were made. The due date for Form 8928 may be automatically extended for six months by filing a completed Form 7004 and paying the estimated tax. The extension does not extend the time for paying any tax due.

The excise tax may be waived for violations of the comparable contribution rules if the excise tax imposed is excessive in comparison to the violation and the failure to make comparable contributions was due to reasonable cause (and not to willful neglect).