

## **IRS Requires Reporting and Excise Taxes for Health Plan Noncompliance**

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Employers that sponsor group health plans now have a duty to self-report certain regulatory plan failures and pay excise taxes where such failures are not corrected in a timely fashion once discovered or are attributable to willful neglect.

The Internal Revenue Code (the Code) imposes excise taxes for failure to comply with COBRA, the Health Insurance Portability and Accountability Act (HIPAA), and other federal group health plan mandates. Historically, the IRS has not been very active in examining health plans for compliance with these rules or in assessing excise taxes when noncompliance has been discovered. However, recently issued IRS final regulations require employers to self-report violations of these rules and pay related excise taxes, where appropriate under the Code and applicable regulations.

The employer—or in some cases the insurer, health maintenance organization (HMO) or third-party administrator—must report health plan compliance failures annually on IRS Form 8928, “Return of Certain Excise Taxes Under Chapter 43 of the Internal Revenue Code.” This form and its corresponding instructions provide much of the substantive guidance for compliance with the new self-reporting requirements.

The excise taxes imposed can be steep. For example, violations of COBRA, HIPAA and the genetic anti-discrimination law can result in excise taxes of \$100 per day per individual affected. To avoid these excise taxes, compliance with group health plan mandates is key.

### **What Types of Violations Are Covered by the New Reporting Obligation?**

Excise taxes may be imposed for failure to meet certain federal health plan requirements, including:

- Federal health care continuation requirements (COBRA).
- Health plan portability and nondiscrimination requirements (HIPAA).
- Mental health parity (Mental Health Parity and Addiction Equity Act, or MHPAEA).
- Minimum hospital stays for newborns and mothers (Newborns’ and Mothers’ Health Protection Act).
- Genetic nondiscrimination requirements (Genetic Information Nondiscrimination Act, or GINA).
- Coverage of dependent students on medically necessary leaves of absence (Michelle’s Law).
- Health savings account (HSA) and Archer medical savings account (Archer MSA) contribution comparability requirements.

The new self-reporting requirements apply to noncompliance with any one of these

requirements.

### **When Does the Reporting Obligation Become Effective?**

The reporting obligation is effective for plan years beginning on or after Jan. 1, 2010.

### **When Are the Payment of the Excise Tax and Filing of Form 8928 Due?**

In all instances, the excise tax must be paid to the IRS at the same time and place that Form 8928 is filed. However, the deadline for reporting on Form 8928 will vary depending on the type of violation. Employers must file and report violations on Form 8928 and remit payment:

- On or before a liable employer's (or in some cases insurer's, HMO's or third-party administrator's) income tax return filing due date, for violations related to COBRA, HIPAA, GINA, MHPAEA, the Newborns' and Mothers' Health Protection Act, and Michelle's Law. An extension to file income taxes does not extend the date for filing Form 8928.
- On or before April 15 following an impermissible contribution, for violations of the HSA or Archer MSA comparability rules.

### **How Is the Excise Tax Amount Determined?**

The amount of excise tax imposed for a violation remains unchanged by the new regulations and will vary depending on the type of violation.

- The excise tax for noncompliance with the rules related to COBRA, HIPAA, GINA, MHPAEA, the Newborns' and Mothers' Health Protection Act, and Michelle's Law generally is \$100 per individual per day (for each individual to whom the violation relates for each day of noncompliance). However, this excise tax is subject to certain limits and other special rules.
- The excise tax for noncompliance with the rules related to HSA and Archer MSA comparable employer contributions is generally 35 percent of the aggregate employer contributions made to all HSAs or Archer MSAs during the applicable calendar year.

### **How Can the Excise Tax Be Avoided?**

The excise tax for violations of any of the group health plan rules other than the comparable contribution requirements for HSAs and Archer MSAs can be avoided in a variety of circumstances.

- First, no excise tax is imposed during the period when the employer did not know, or exercising reasonable diligence would not have known, a plan failure existed.
- Second, once the plan failure is discovered, no excise tax will be imposed if the failure was attributable to reasonable cause and the failure is "corrected."

For these purposes, "corrected" means fixing the failure retroactively (to the extent possible) within 30 days of the first date on which the error was known or should have been known, and placing any affected individual in at least the same financial position as he or she would have been had the failure not occurred. Also, the IRS may waive all or part of the excise tax if the amount of tax is deemed excessive relative to the failure involved and the failure was attributable to reasonable cause and not to willful neglect. In addition, governmental plans, church plans and certain small plans might be exempt from the excise tax under certain

circumstances.

In the case of failure to comply with the comparable contribution requirements for HSAs and Archer MSAs, the excise tax can be waived. The IRS may waive all or part of the excise tax if the amount of tax is deemed excessive relative to the failure involved and the failure was attributable to reasonable cause and not to willful neglect.

### **What If a Plan Failure Was Attributable to Reasonable Cause and Was Corrected Promptly?**

It still must be reported on Form 8928. Form 8928 and its instructions contemplate clearly that plan failures must be reported even when they were corrected fully in a timely fashion, such that no excise tax is due.

### **What Is the Penalty for Not Timely Filing Form 8928?**

If a liable entity fails to report and pay excise taxes in a timely manner, the IRS may increase the taxpayer's liability by assessing penalties and interest, unless the failure to file and pay is attributable to reasonable cause and not willful neglect. The penalty for filing Form 8928 late is 5 percent of the unpaid excise tax for each month the form is late, up to 25 percent. A separate penalty calculation applies for late payment of the excise tax, assuming that the form has been filed.

### **What Should I Do Now?**

This new reporting obligation makes compliance with group health plan requirements more important than ever. To avoid excise taxes under this new self-reporting regime, employers and administrators of group health plans should have procedures and processes in place that are designed reasonably to ensure compliance. If plan failures occur nonetheless, the employer and other responsible parties must take action promptly to correct the violation within 30 days.

**Return of Certain Excise Taxes Under  
 Chapter 43 of the Internal Revenue Code**

(Under sections 4980B, 4980D, 4980E, and 4980G)

Filer tax year beginning \_\_\_\_\_, \_\_\_\_\_ and ending \_\_\_\_\_, \_\_\_\_\_

<b>A</b> Name of filer (see instructions)	<b>B</b> Filer's employer identification number (EIN)
Number, street, and room or suite no. (If a P.O. box, see instructions)	
City or town, state, and ZIP code	
<b>C</b> Name of plan	<b>E</b> Plan sponsor's EIN
<b>D</b> Name and address of plan sponsor	<b>F</b> Plan year ending (MM/DD/YYYY)
	<b>G</b> Plan number

**Part I Tax on Failure To Satisfy Continuation Coverage Requirements Under Section 4980B**  
 Complete a separate Part I, lines 1 through 6 for failures due to reasonable cause and not to willful neglect, and a separate Part I, lines 12 through 14, for other failures, for each qualifying event for which one or more failures to satisfy continuation coverage requirements that occurred during the reporting period (see instructions).

**Section A – Failures Due to Reasonable Cause and Not to Willful Neglect**

1 Enter the total number of days of noncompliance in the reporting period . . . . .	<b>1</b>	
2 Enter the number of qualified beneficiaries for which a failure occurred as a result of this qualifying event . . . . . <b>2</b>		
3 If you entered 2 or more on line 2, multiply line 1 by \$200. Otherwise, multiply line 1 by \$100 . . . . .	<b>3</b>	
4 If the failure was not discovered despite exercising reasonable diligence or was corrected within the correction period and was due to reasonable cause, enter -0- here, and then go to line 5. Otherwise, enter the amount from line 3 on line 6 and go to line 7 . . . . .	<b>4</b>	
5 If the failure was not corrected before the date a notice of examination of income tax liability was sent to the employer and the failure continued during the examination period, multiply \$2,500 by the number of qualified beneficiaries for whom one or more failures occurred (multiply by \$15,000 to the extent the violations were more than <i>de minimis</i> for a qualified beneficiary). If the failures were corrected before the day a notice of examination was sent, enter -0- . . . . .	<b>5</b>	
6 Enter the smaller of line 3 or line 5 . . . . .	<b>6</b>	
7 If there was more than one qualifying event, add the amounts shown on line 6 of all forms, and enter the total on a single "summary" form. Otherwise, enter the amount from line 6 above . . . . .	<b>7</b>	
8 Enter the aggregate amount paid or incurred during the preceding tax year for a single employer group health plan or the amount paid or incurred during the current tax year for a multiemployer health plan to provide medical care . . . . . <b>8</b>		
9 Multiply line 8 by 10% (.10) . . . . .	<b>9</b>	
10 Amount from section 4980B(c)(4) . . . . .	<b>10</b>	500,000
11 Enter the smallest of lines 7, 9, or 10. For a third-party administrator, HMO, or insurance company, the amount you enter on this line filed for all plans you administer during the same tax year cannot exceed \$2 million; reduce the amount you would otherwise enter on this line to the extent the amount for all plans would exceed this limit . . . . .	<b>11</b>	

**Section B – Failures Due to Willful Neglect or Otherwise Not Due to Reasonable Cause**

12 Enter the total number of days of noncompliance in the reporting period . . . . .	<b>12</b>	
13 Enter the number of qualified beneficiaries for which a failure occurred as a result of this qualifying event . . . . . <b>13</b>		
14 If you entered 2 or more on line 13, multiply line 12 by \$200. Otherwise, multiply line 12 by \$100 . . . . .	<b>14</b>	
15 If there was more than one qualifying event, add the amounts shown on line 14 of all forms, and enter the total on a single "summary" form. Otherwise, enter the amount from line 14 above . . . . .	<b>15</b>	

**Section C – Total Tax Due Under Section 4980B**

16 Add lines 11 and 15 . . . . . ▶	<b>16</b>	
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Name of filer:

Filer's EIN:

**Part II Tax on Failure To Meet Portability, Access, and Renewability Requirements Under Section 4980D**

Complete a separate Part II, lines 17 through 23, for failures due to reasonable cause and not to willful neglect, and a separate Part II, lines 29-32, for other failures to meet certain group health plan requirements that occurred during the reporting period (see instructions).

**Section A – Failures Due to Reasonable Cause and Not to Willful Neglect**

17	Enter the total number of days of noncompliance in the reporting period . . . . .		17	
18	Enter the number of individuals to whom the failure applies . . . . .	18		
19	Multiply line 17 by line 18 . . . . .	19		
20	Multiply line 19 by \$100 . . . . .		20	
21	If the failure was not discovered despite exercising reasonable diligence or was corrected within the correction period and was due to reasonable cause, enter -0- here, and then go to line 22. Otherwise, enter the amount from line 20 on line 23 and go to line 24 . . . . .		21	
22	If the failure was not corrected before the date a notice of examination of income tax liability was sent to the employer and the failure continued during the examination period, multiply \$2,500 by the number of qualified beneficiaries for whom one or more failures occurred (multiply by \$15,000 to the extent the violations were more than <i>de minimis</i> for a qualified beneficiary). If the failures were corrected before the day a notice of examination was sent, enter -0- . . . . .		22	
23	Enter the smaller of line 20 or line 22 . . . . .		23	
24	If there was more than one failure, add the amounts shown on line 23 of all forms, and enter the total on a single "summary" form. Otherwise, enter the amount from line 23 above . . . . .		24	
25	Enter the aggregate amount paid or incurred during the preceding tax year for a single employer group health plan or the amount paid or incurred during the current tax year for a multiemployer health plan to provide medical care . . . . .	25		
26	Multiply line 25 by 10% (.10) . . . . .		26	
27	Amount from section 4980D(c)(3) . . . . .		27	500,000
28	Enter the smallest of lines 24, 26, or 27. . . . .		28	

**Section B – Failures Due to Willful Neglect or Otherwise Not Due to Reasonable Cause**

29	Enter the total number of days of noncompliance in the reporting period . . . . .		29	
30	Enter the number of individuals to whom the failure applies . . . . .	30		
31	Multiply line 29 by line 30 . . . . .	31		
32	Multiply line 31 by \$100 . . . . .		32	
33	If there was more than one failure, add the amounts shown on line 32 of all forms, and enter the total on a single "summary" form. Otherwise, enter the amount from line 32 above . . . . .		33	

**Section C – Total Tax Due Under Section 4980D**

34	Add lines 28 and 33 . . . . .		34	
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**Part III Tax on Failure To Make Comparable Archer MSA Contributions Under Section 4980E**

35	Aggregate amount contributed to Archer MSAs of employees within calendar year . . . . .		35	
36	Total tax due under section 4980E. Multiply line 35 by 35% (.35) . . . . .		36	

**Part IV Tax on Failure To Make Comparable HSA Contributions Under Section 4980G**

37	Aggregate amount contributed to HSAs of employees within calendar year . . . . .		37	
38	Total tax due under section 4980G. Multiply line 37 by 35% (.35) . . . . .		38	

**Part V Tax Due or Overpayment**

39	Add lines 16, 34, 36, and 38 . . . . .		39	
40	Enter amount of tax paid with Form 7004 . . . . .		40	
41	<b>Tax due.</b> Subtract line 40 from line 39. If less than zero, enter -0-, and go to line 42. If the result is greater than zero, enter here and attach a check or money order payable to "United States Treasury." Write your name, identifying number, plan number, and "Form 8928" on your payment . . . . .		41	
42	<b>Overpayment.</b> Subtract line 39 from line 40 . . . . .		42	

**Sign Here**

Under penalties of perjury, I declare that I have examined this return, including accompanying schedules and statements, and to the best of my knowledge and belief, it is true, correct, and complete. Declaration of preparer (other than taxpayer) is based on all information of which preparer has any knowledge.

Your signature     
  Telephone number     
  Date

**Paid Preparer's Use Only**

Preparer's signature <input type="text"/>	Date <input type="text"/>	Check if self-employed <input type="checkbox"/>	Preparer's SSN or PTIN <input type="text"/>
Firm's name (or yours, if self-employed), address, and ZIP code <input type="text"/>			EIN <input type="text"/>
			Phone no. ( <input type="text"/> ) <input type="text"/>