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New IRS Form 8928 Should Not Be Taxing

By Rich Glass, J.D.

Mistakes happen. When it comes to administering a group health plan, though, you cannot hide your mistakes. The Internal Revenue Code has an excise tax system in place for reporting these mistakes, and the Internal Revenue Service (IRS) recently finalized Form 8928 for this very purpose. The form is a follow-up to final regulations issued Sept. 8, 2009 (74 Fed. Reg. 45994).

Reportable mistakes fall into three main categories:

- 1) COBRA and pediatric vaccine violations, under Code Section 4980B;
- 2) HIPAA portability violations, under Section 4980D; and
- 3) failing to make comparable contributions to Archer medical savings accounts (§4980E) or health savings accounts (§4980G) (see ¶940 of the *Guide*).

Excise taxes have existed for some time, but the reporting requirement is relatively new. Generally, Form 8928 took effect Jan. 1, 2010.

Who Must Comply?

While HIPAA's excise tax section (§4980D) lists only the employer and a multi-employer plan as liable, the IRS' recent rules make it clear that the excise tax

applies more broadly. Potential liability for the excise tax extends to any "other person responsible for providing or administering benefits under a group health plan (such as an insurer or a third party administrator)."

However, the tax does not apply to HIPAA-excepted benefits like limited scope dental and vision plans, or to small employers with fully insured health plans. For this purpose, a "small employer" is one that employs an average of two to 50 employees during the prior calendar year and at least two employees on the first day of the plan year.

What HIPAA Violations Are Reportable?

The excise tax and Form 8928 apply to the various HIPAA mandates for group health plans under Chapter 100 of the Code (see box). They do not apply to violations of HIPAA's privacy, security or electronic data interchange rules, or the new breach notification requirements of the Health Information Technology for Economic and Clinical Health Act (see Tab 800).

How Do You Calculate the Amount of Excise Tax?

There is no sliding scale with the excise tax, at least not initially. The regular rate is

See Form 8928, p. 5

HIPAA Portability Violations Subject to Excise Tax Reporting

Violation	Code Section
Certificates of creditable coverage	§9801
Creditable coverage determinations	§9801
Genetic information nondiscrimination and testing	§9802
Guaranteed renewability for multiemployer plans and multiple employer welfare arrangements	§9803
Health status nondiscrimination	§9802
Mental health parity, including substance use disorders	§9812
Michelle's Law, governing medically necessary student leaves	§9813
Minimum hospital stays for mothers and newborns	§9811
Pre-existing condition exclusions, including general and specific notices	§9801
Special enrollment rights and notice	§9801

DOL Model CHIPRA Notice Triggers Plan Obligation

Employers face a new notice requirement, potentially as soon as May 1, now that the U.S. Department of Labor (DOL) has issued a model notice to employees under the Children's Health Insurance Program Reauthorization Act of 2009 (CHIPRA).

The model notice is a uniform standard document that may be used by employers nationwide to meet CHIPRA's employee notice requirement, DOL explained in a Feb. 4 *Federal Register* notice (75 Fed. Reg. 5808). The notice describes the relevant CHIPRA provisions and lists contact information for the states whose CHIP or Medicaid programs offer premium assistance, as the CHIPRA law authorizes. Employers that fail to issue these notices are subject to penalties of up to \$100 per day per employee.


Most states are offering such assistance, and even employers located in states that do not must provide the notice to any employees who reside in states that do. So for example, even though the District of Columbia lacks a premium assistance program, an employer located there still must notify any employees (regardless of enrollment status) who reside in Virginia, a state with premium assistance. An employer may simply notify all

its employees if that is easier than differentiating them by state of residence.

Employers must send the notice annually, free of charge, starting with the first plan year after Feb. 4, 2010, although plans whose plan years begin between Feb. 4 and April 30 have until May 1, 2010. The notice may be provided with enrollment packets, open season materials or the summary plan description, but must appear "separately and in a manner which ensures that an employee who may be eligible for premium assistance could reasonably be expected to appreciate its significance," DOL stated.

CHIPRA (Pub. L. 111-3), enacted in February 2009, also added two new triggering events to HIPAA's special enrollment provisions. Group health plans had to begin honoring these enrollment rights April 1, 2009 (see ¶414 of the *Guide*).

For More Information

The model notice is available on DOL's Web site at <http://www.dol.gov/ebsa/chipmodelnotice.doc> (Word file) or <http://www.dol.gov/ebsa/pdf/chipmodelnotice.pdf> (PDF file). 

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\$100 per day, per individual. There are two ways to avoid paying the excise tax. First, no tax liability exists if no one liable for the tax "*knew, or exercising reasonable diligence would have known*" that the mistake happened.

Second, no tax liability exists if the mistake was "*due to reasonable cause and not due to willful neglect and the failure was corrected during the 30-day period after anyone liable for the tax knew, or exercising reasonable diligence should have known*" that the failure existed. Correcting a failure requires undoing it retroactively and putting the individual in the same financial position as if the failure had never happened. Unfortunately, the IRS has not defined the terms "reasonable cause" and "reasonable diligence," or provided any examples.

Regardless, you must correct even a "reasonable cause" failure before the IRS issues an audit letter or else be liable for a minimum excise tax: \$2,500 per individual, if the error is considered "*de minimis*," or \$15,000 per individual otherwise. This minimum excise tax does not apply to church plans as defined by Code Section 414(e). The U.S. Treasury Secretary has the discretion to waive or reduce the excise tax, based on circumstances.

When Is the Excise Tax Due?

The deadline for paying the excise tax for HIPAA violations is the due date for filing the employer's federal income tax returns (without extensions). The deadline for multi-employer plans coincides with the Form 5500 filing date: the last day of the seventh month after the end of the plan year. An extension of time to file the form is automatically available. Any late payment of tax, however, will be subject to interest. A penalty of 5 percent per month is payable on late filings of the form.

What Should Employers Do?

In most cases, the excise tax will be self-reported. Prudent employers and others responsible for plan administration should ensure that their plan documents, overall design and related notices comply with HIPAA's portability requirements. If you suspect or detect a violation, you should take immediate corrective action and strive to put affected individuals in the same place financially that they would have been without the violation. Ignoring the violation will simply mean a greater penalty when discovered by the IRS.

See *Form 8928*, p. 8


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ERIC Warns Agencies About GINA Rules' Impact on Wellness

Employee wellness programs would be severely impaired by the “new and unforeseen restrictions on health risk assessments” (HRAs) in the recently finalized Genetic Information Nondiscrimination Act (GINA) rules for health plans, according to a leading plan sponsor group.

The three agencies that issued the GINA Title I rules in October should delay the requirements for a year to get “an opportunity to understand how the regulations will affect workplace wellness programs,” according to a Nov. 13 letter from Mark Ugoretz, president of the ERISA Industry Committee (ERIC). “If group health plans are prohibited from offering participants incentives to complete confidential HRAs that include family medical histories, these programs will become far less effective.”


In the Oct. 7 interim final rules (74 Fed. Reg. 51664), the U.S. Departments of Labor, Health and Human Services (HHS) and the Treasury interpreted GINA’s ban on collecting or using individuals’ genetic information for “underwriting purposes” to encompass monetary incentives for completing HRAs that ask about family history. HHS also proposed amending HIPAA’s privacy rules accordingly (74 Fed. Reg. 51698). (See ¶500 of the *Guide*, December 2009 newsletter.)

“Nothing in Title I of GINA or its legislative history suggests that Congress intended to impose such a restriction,” Ugoretz argued in the letter. 

Form 8928 (continued from page 5)

Also, review Form 8928 itself (<http://www.irs.gov/pub/irs-pdf/f8928.pdf>) and its instructions (<http://www.irs.gov/pub/irs-pdf/i8928.pdf>).

Ultimately, excise tax reporting should not be a major concern. The principles behind it are simple:

- When you make a mistake, fix it.
- Honest mistakes can be forgiven. 

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