Employee Benefits Series

Health Care Reform Penalties

BY COMPANY SIZE

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Health Care Reform Penalties by Company Size

The following is a **general overview** of the penalties that may apply if employers do not comply with key provisions under Health Care Reform. The information is subject to change based on new government requirements or amendments to the law. Additionally, your company or group health plan may be exempt from certain requirements and/or subject to more stringent requirements under your state's laws. **If you have any questions regarding your obligations, please consult knowledgeable employment law counsel.**

The Affordable Care Act (ACA) amends various preexisting federal laws, including the Internal Revenue Code (IRC) and the Employee Retirement Income Security Act (ERISA). Therefore, enforcement of many ACA requirements may be carried out through the mechanisms provided for in those laws. For purposes of this chart:

- The term "**$100 excise tax**" refers to a penalty tax, imposed by employers under the IRC, of $100 per affected individual for each day the plan is not in compliance[+].
- The term "**ERISA penalties**" refers to a civil action by the U.S. Department of Labor (DOL) or plan participants or beneficiaries to compel the plan or sponsor to comply with ERISA. Civil money penalties may also apply.

PENALTIES FOR ALL EMPLOYERS

Employers Sponsoring Group Health Plans	
Employer Payment Plans Prohibited	Employer payment plans—arrangements under which an employer reimburses an employee for some or all of the premium expenses incurred for an individual health insurance policy, or uses its funds to directly pay the premium for an individual policy—are considered group health plans that do not comply with the ACA **Penalties for Noncompliance:** $100 excise tax (small employers—generally those with fewer than 50 full-time employees, including full-time equivalents—were granted temporary relief from this penalty through June 30, 2015); ERISA penalties.
Dependent Coverage to Age 26	Plans that offer dependent coverage must continue to make the coverage available until a child reaches the age of 26, regardless of other coverage options **Penalties for Noncompliance:** $100 excise tax; ERISA penalties.
No Lifetime or Annual Limits	Plans cannot impose lifetime or annual dollar limits on coverage of "essential health benefits" **Penalties for Noncompliance:** $100 excise tax; ERISA penalties. *Note: Health plans may continue to limit the number of visits to health providers and days of treatment so long as the visit or day limit does not amount to a dollar limit.*
No Pre-Existing Condition Exclusions	Plans cannot exclude individuals from coverage or limit or deny benefits on the basis of pre-existing medical conditions **Penalties for Noncompliance:** $100 excise tax; ERISA penalties.
90-Day Limitation on Waiting Periods	Plans cannot use a waiting period—the time that must pass before coverage for an employee or dependent who is otherwise eligible to enroll under the terms of the plan can become effective—that exceeds 90 days **Penalties for Noncompliance:** $100 excise tax; ERISA penalties.

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PENALTIES FOR ALL EMPLOYERS (CONT'D)	
Employers Sponsoring Group Health Plans	
Nondiscrimination for Wellness Programs	Employers sponsoring a health-contingent wellness program in connection with a group health plan (i.e., a program that requires an individual to satisfy a standard related to a health factor in order to obtain a reward) must confirm the program complies with revised nondiscrimination rules **Penalties for Noncompliance:** $100 excise tax; ERISA penalties.
Summary of Benefits and Coverage (SBC)	Plans must provide an SBC to participants and beneficiaries at several points during the enrollment process and upon request, explaining what the plan covers and what it costs **Penalties for Noncompliance:** Plans that willfully fail to provide the required information will be subject to a fine of not more than $1,000 for each failure (each participant or beneficiary constitutes a separate offense). Plans are also generally subject to the $100 excise tax and ERISA penalties.
Notice of Modification	Plans must ensure that participants and beneficiaries are provided with notice of any material modification that would affect the content of the SBC (and that occurs other than in connection with coverage renewal or reissuance) no later than 60 days prior to the effective date of the change **Penalties for Noncompliance:** Plans that willfully fail to provide the required information will be subject to a fine of not more than $1,000 for each failure (each participant or beneficiary constitutes a separate offense). Plans are also generally subject to the $100 excise tax and ERISA penalties.
Medical Loss Ratio (MLR) Rebates	Employers of fully insured plans are responsible for distributing rebates, received as a result of insurers not meeting specific standards related to how premium dollars are spent, to eligible plan enrollees where appropriate **Penalties for Noncompliance:** Any portion of a rebate constituting plan assets must be handled in accordance with ERISA's fiduciary responsibility provisions. Fiduciaries that do not follow the basic standards of conduct may be personally liable.
PCORI Fees for Employers Sponsoring Self-Insured Plans	For plan years ending on or after Oct. 1, 2012, and before Oct. 1, 2019, employers that sponsor certain self-insured plans—including HRAs that are not treated as excepted benefits—must pay fees to fund the Patient-Centered Outcomes Research Institute (fees are filed annually using Form 720 and are due no later than July 31st of the year following the last day of the plan year to which the fee applies) **Penalties for Noncompliance:** Standard penalties related to late filing or late tax payment generally apply, but these penalties may be waived or abated if the employer has reasonable cause and the failure was not due to willful neglect.
Transitional Reinsurance Program Fees	Employers sponsoring certain self-insured plans must make contributions to support payments to individual market issuers that cover high-cost individuals **Penalties for Noncompliance:** In general, a maximum penalty of $100 per day for each affected individual is imposed, with certain limitations for failures corrected within 30 days or failures not discovered when exercising reasonable diligence.

PENALTIES FOR ALL EMPLOYERS (CONT'D)		
Employers Sponsoring Non-Grandfathered Group Health Plans		
Preventive Services Coverage	Plans must cover certain preventive services delivered by in-network providers without cost-sharing **Penalties for Noncompliance:** $100 excise tax; ERISA penalties.	
Patient Protections	Plans must give participants certain rights with respect to choosing a primary care provider or a pediatrician (when the plan requires designation of a primary care physician), obtaining OB/GYN care without prior authorization (if coverage is provided for OB/GYN care under the plan), and coverage of emergency services (for plans that provide such benefits) **Penalties for Noncompliance:** $100 excise tax; ERISA penalties. *Note: Plans must also provide a notice to participants outlining their right to choose a primary care provider or pediatrician, or to obtain OB/GYN care without prior authorization, when applicable.*	
Reviewing Claims Decisions	Plans must follow new procedures regarding decisions to deny payment for treatment or services **Penalties for Noncompliance:** $100 excise tax; ERISA penalties. *Note: Plans must also provide specific notices to participants and beneficiaries when a claim for benefits is denied.*	
Coverage of Essential Health Benefits	Fully insured plans offered in the small group market (both inside and outside of Health Insurance Exchanges) must cover a core package of items and services known as "essential health benefits" **Penalties for Noncompliance:** $100 excise tax; ERISA penalties.	*Note: If allowed by a particular state and insurer, a small business may be able to renew its current group coverage that does not comply with the requirements related to essential health benefits and cost-sharing limits, through policy years beginning on or before October 1, 2016.*
Limits on Cost-Sharing	Out-of-pocket costs under the plan for coverage of "essential health benefits" provided in-network cannot exceed certain limitations **Penalties for Noncompliance:** $100 excise tax; ERISA penalties.	
Employers Sponsoring Grandfathered Group Health Plans		
Disclosure of Grandfathered Status	A plan must include a statement indicating the plan believes it is a grandfathered plan, along with certain other information, in any plan materials provided to participants or beneficiaries describing the benefits provided under the plan **Penalties for Noncompliance:** Loss of grandfathered status, which requires the plan to come into compliance with all ACA provisions that previously did not apply because the plan was exempt.	

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PENALTIES FOR ALL EMPLOYERS (CONT'D)	
Employers With Tax-Favored Arrangements	
Cafeteria Plan Benefits	Employers may not provide a qualified health plan offered through the Individual Health Insurance Marketplace as a benefit under the employer's section 125 cafeteria plan (a plan which meets specific requirements to allow employees to receive benefits on a pre-tax basis) **Penalties for Noncompliance:** In general, if a plan fails to operate in compliance with section 125, it is not considered a cafeteria plan and employees' elections of nontaxable benefits will result in gross income to the employees. ERISA penalties may also apply. *Note: This requirement **does not apply** to group coverage offered through the SHOP Marketplace*
Health FSAs Through Cafeteria Plans	A health flexible spending arrangement (FSA) must be offered through a cafeteria plan in order to comply with the annual dollar limit prohibition **Penalties for Noncompliance:** $100 excise tax; ERISA penalties.
Health FSAs as Excepted Benefits	A health FSA must qualify as excepted benefits to comply with the preventive services requirements **Penalties for Noncompliance:** $100 excise tax; ERISA penalties.
Health FSA Contribution Limits	The amount of salary reduction contributions to health FSAs must be limited to $2,500 annually (as adjusted for inflation—for taxable years beginning in 2015, the annual limit increased to **$2,550**); written cafeteria plans must have been amended by Dec. 31, 2014 to reflect this change **Penalties for Noncompliance:** If a cafeteria plan fails to operate in compliance with section 125 or fails to satisfy any of the written plan requirements for health FSAs, the plan is generally not considered a cafeteria plan and employees' elections of nontaxable benefits result in gross income to the employees. *Note: If a cafeteria plan timely complies with the written plan requirement limiting health FSA salary reduction contributions, but one or more employees are erroneously allowed to elect a salary reduction of more than the limit for a plan year, the plan **may still be considered a cafeteria plan for that plan year** if certain conditions are satisfied.*
Health Reimbursement Arrangements	An HRA may not be used to reimburse an employee's individual insurance policy premiums **Penalties for Noncompliance:** $100 excise tax; ERISA penalties.
All Employers (No Group Health Plan Required)	
Exchange Notice	Employers must provide written notice about the Health Insurance Exchange (Marketplace) to each new employee at the time of hiring, within 14 days of the employee's start date **Penalties for Noncompliance:** There is no fine or penalty for failing to provide the notice.

PENALTIES FOR ALL EMPLOYERS (CONT'D)

All Employers (No Group Health Plan Required)	
Break Time for Nursing Mothers	Employers must provide reasonable break time for an employee to express breast milk for her nursing child for 1 year after the child's birth, as well as a place to do so (other than a bathroom) that is shielded from view and free from intrusion from coworkers and the public **Penalties for Noncompliance:** Any employee who is terminated or otherwise discriminated against may file a retaliation complaint with the DOL or may file a private cause of action seeking appropriate remedies including, but not limited to, employment, reinstatement, lost wages, and liquidated damages. The DOL can also seek injunctive relief in federal district court, and may obtain reinstatement and lost wages for the employee. *Note: Employers with fewer than 50 employees **are not subject to the break time requirement** if compliance would impose an undue hardship.*
Additional Medicare Tax for High Earners	Employers must withhold Additional Medicare Tax—at a rate of 0.9%—on wages or compensation paid to an employee in excess of $200,000 in a calendar year **Penalties for Noncompliance:** Employers that do not deduct and withhold Additional Medicare Tax as required are liable for the tax, unless the tax they failed to withhold is paid by the employee. Even if not liable for the tax, employers that do not meet their withholding, deposit, reporting, and payment responsibilities for Additional Medicare Tax may be subject to the applicable penalties for willfully failing to deduct and withhold.

PENALTIES FOR EMPLOYERS WITH 50+ EMPLOYEES

Employer Information Reporting on Health Insurance Coverage	Large employers subject to "pay or play" (generally those with **50 or more full-time employees**, including full-time equivalents) are required to report certain information to the IRS and to their employees regarding compliance with the pay or play provisions and the health care coverage they have offered Note: Self-insured employers providing minimum essential health coverage (**regardless of size**) are subject to a separate set of information reporting requirements; however, the penalties for noncompliance are the same. **Penalties for Noncompliance:** General reporting penalty provisions for failure to file correct information returns and employee statements may apply—ranging from $30-$100 per return (increased to $250 for returns and statements required to be filed after Dec. 31, 2015), with a maximum penalty of $1.5 million per year (increased to $3 million for returns and statements required to be filed after Dec. 31, 2015)—with certain exceptions if the failure is due to reasonable cause and not willful neglect. In general, the IRS **will not impose penalties** for 2015 returns and statements filed and furnished in 2016 on reporting entities that can show that they have made **good faith efforts to comply**.

PENALTIES FOR EMPLOYERS WITH 50+ EMPLOYEES (CONT'D)

Employer Shared Responsibility ("Pay or Play")	Large employers (generally those with **50 or more full-time employees**, including full-time equivalents) must offer affordable health insurance that provides a minimum level of coverage ("minimum value") to full-time employees and their dependents or pay a penalty tax if any full-time employee is certified to receive a premium tax credit for purchasing coverage on the Health Insurance Exchange (Marketplace) ***Note:** Employers with **100 or more full-time employees** (including full-time equivalents) are subject to these requirements starting in 2015, while those with **50 to 99 full-time employees** (including full-time equivalents) do not need to comply until 2016 if they meet certain criteria.* **Penalties for Noncompliance:** There are two circumstances under which large employers may owe a penalty: 1. **Employers Not Offering Coverage:** A large employer that does not offer coverage or offers coverage to fewer than 70%* of its full-time employees (and their dependents, unless transition relief applies) during the calendar year owes a penalty equal to the number of full-time employees employed for the year (minus up to 80*) multiplied by $2,000 ($2,080 for 2015 and $2,160 for 2016)**, as long as at least one full-time employee receives a premium tax credit. For an employer that offers coverage for some months but not others during the calendar year, the penalty is computed separately for each month for which coverage was not offered. The amount of the penalty for the month equals the number of full-time employees employed for the month (minus up to 80*) multiplied by 1/12 of $2,000 ($2,080 for 2015 and $2,160 for 2016)**. 2. **Employers Offering Coverage That is Not Affordable or Does Not Provide Minimum Value:** For a large employer that offers coverage to at least 70%* of its full-time employees (and their dependents, unless transition relief applies), but has one or more full-time employees who receive a premium tax credit, the penalty is computed separately for each month. The amount of the penalty for the month equals the number of full-time employees who receive a premium tax credit for that month multiplied by 1/12 of $3,000 ($3,120 for 2015 and $3,240 for 2016)**. The penalty is the **lesser of** the amount calculated or the amount that would be owed if the employer did not offer coverage. *After 2015, 95% should be substituted for 70%, and 30 should be substituted for 80. In addition, the transition relief for dependent coverage will generally not be available for periods on or after January 1, 2016 (or, if applicable, for any period after the last day of the 2015 plan year). **For calendar years after 2014, penalty amounts are adjusted for inflation; however, the IRS has not released the specific penalty amounts that will apply for 2015 or 2016. The 2015 and 2016 amounts used above are derived from statutory formulas using the premium adjustment percentages announced by the U.S. Department of Health and Human Services.

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PENALTIES FOR EMPLOYERS WITH 250+ EMPLOYEES	
Employers Sponsoring Group Health Plans	
Form W-2 Reporting	Employers who must file 250 or more Forms W-2 for the preceding calendar year and who sponsor a group health plan are required to report the cost of coverage provided to each employee on the Form W-2 (provided to employees in January), with certain exceptions **Penalties for Noncompliance:** General reporting penalty provisions for failure to file correct information returns and employee statements may apply —ranging from $30-$100 per return (increased to $250 for returns and statements required to be filed after Dec. 31, 2015), with a maximum penalty of $1.5 million per year (increased to $3 million for returns and statements required to be filed after Dec. 31, 2015)—with certain exceptions if the failure is due to reasonable cause and not willful neglect.

ACA PENALTY PROVISIONS THAT ARE NOT YET EFFECTIVE	
Employers Sponsoring Group Health Plans	
Excise Tax on High Cost Employer-Provided Coverage	**Effective Beginning in 2018:** The cost of plan benefits generally cannot exceed the threshold of $10,200 for self-only coverage and $27,500 for family coverage, with exceptions for certain types of coverage **Penalties for Noncompliance:** Employers sponsoring self-insured plans will pay a 40% tax (known as the "cadillac tax") for any amount of the premium that is above these thresholds—but all employers that sponsor group health plans are responsible for calculating this amount. (For fully insured plans, the issuer is responsible for paying the tax.) Additional penalties may apply for failing to properly calculate this amount.
Automatic Enrollment	**Effective Date Delayed:** Employers with **more than 200 full-time employees** must automatically enroll new full-time employees in one of the employer's health plans (subject to any waiting period authorized by law), and must continue the enrollment of current employees in a health plan offered through the employer **Penalties for Noncompliance:** Employers are not required to comply until final regulations are issued and become applicable.
Employers Sponsoring Non-Grandfathered Group Health Plans	
Nondiscrimination Rules for Insured Group Plans	**Effective Date Delayed:** Fully insured plans must comply with the rules prohibiting discrimination in favor of highly compensated individuals, which are currently applicable to self-insured plans **Penalties for Noncompliance:** $100 excise tax; ERISA penalties. Compliance with the nondiscrimination provisions will not be required (and thus, any sanctions for failure to comply do not apply) until after regulations or other administrative guidance of general applicability are issued. *Note: Cafeteria plan health benefits remain subject to the nondiscrimination requirements of Internal Revenue Code section 125.*

+ The excise tax applies on the day a failure first occurs and ends on the day the failure is corrected. The minimum tax is $2,500 for violations not corrected before the date a notice of examination of income tax liability is sent to the employer, and which occur or continue during the period under examination. The minimum tax for violations determined to be more than "de minimus" is $15,000.

No excise tax will be imposed if:

- *The employer did not know, and exercising reasonable diligence would not have known, that a failure existed; or*
- *The failure was due to reasonable cause and not willful neglect, and such failure is corrected during the 30-day period starting from the date the employer knew, or exercising reasonable diligence would have known, that such failure existed.*
  - *If the failure was not corrected within 30 days, the maximum tax imposed will be the lesser of $500,000 or 10% of the amount paid or incurred by the employer during the preceding taxable year for its group health plans.*

Additionally, the tax ***may not apply*** *to certain fully insured small employer plans (generally those with no more than 50 employees) for a failure to comply which is solely because of the health insurance coverage offered by the issuer.*

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