

February 26, 2015

More Guidance on Employer Payment Plans

The Departments of Treasury (IRS), Labor (DOL), and Health & Human Services (HHS) continue to issue reinforcing guidance on their position that premium reimbursement arrangements or similar employer payment plan arrangements are group health plans subject to the Affordable Care Act (ACA) market reforms and are generally incompatible with healthcare reform.

Background. Employers face significant penalties for reimbursing employees' for some or all of the premium expenses incurred for an individual health insurance policy, or for an arrangement under which the employer uses its funds to directly pay the premium for an individual health insurance policy covering the employee. As a reminder, these "employer payment plans" are considered group health plans that do not comply with the ACA, and may be subject to a \$100 per day excise tax per applicable employee. Recent guidance reiterates the compliance dangers of helping employees obtain individual health insurance coverage. Healthcare reform does not change the tax treatment under Code Section 105 and 106, but these arrangements are group health plans that will violate healthcare reform's annual dollar limit prohibition since they reimburse a fixed amount of medical expenses or individual policy premiums. Employers violating these rules are required to self-report their violation on the IRS's excise tax Form 8928 quarterly. Employers could be subject to the excise taxes if they do any of the following:

- reimburse employees' individual or exchange health insurance premiums either on a pre- or post-tax basis,
- use employer funds to directly pay the premium for an individual or exchange health insurance policy covering the employee, or
- offer employees with high claims risk a choice between the employer's health plan and cash.

Generally, employers are permitted to do the following:

- provide employees with additional taxable cash compensation to assist with payments for individual market coverage, so long as the payment of additional compensation is not conditioned on it being used to pay medical expenses or purchase health coverage and the employer does not otherwise endorse a particular policy, form, or issuer,
- offer health reimbursement arrangements (HRAs) to active employees and be considered in compliance with the ACA, provided the HRAs are integrated with other health coverage, and
- offer a retiree-only HRA or premium payment plan.

Existing and Recent Guidance. [Notice 2013-54](#) provides detailed and now-familiar rules for the permissible HRA integration with other employer group health plan coverage. The Notice provides that a compliant employer group health plan (i.e., one that does not impose annual limits on essential health benefits) may be combined with an arrangement reimbursing medical expenses to determine whether the combined arrangement satisfies the annual limit (and other applicable rules). However, either type of reimbursement arrangement may not be combined with an individual policy purchased by employees.

- [Letter 2014-0037](#) addresses employer reimbursement of employee medical expenses with pre-tax dollars under Code Section 105, and acknowledges that a reimbursement arrangement can be “combined” with a compliant group health plan (as permitted under Notice 2013-54). If an employer does not provide a compliant group health plan, an arrangement reimbursing medical expenses will violate the annual limit prohibition because it provides a “fixed amount” of medical expense reimbursements.
- [Letter 2014-0039](#) addresses pre-tax reimbursement of employee premiums for individual health insurance policies (called an “employer payment plan” by Notice 2013-54). Arrangements reimbursing individual policy premiums will violate that prohibition because they are deemed to establish a reimbursement limit equal to premiums paid. Employers not providing group health plan coverage can pay employees additional compensation that can be used to purchase health coverage (provided it is not restricted to the purchase of that coverage). While this approach provides no tax benefit, it is one of the few safe courses available after Notice 2013-54.

Newly released [Notice 2015-17](#) offers additional guidance (clarifying and supplementing Notice 2013-54 HRA guidance) for employers who wish to offer benefits that supplement Medicare and TRICARE.

Medicare. An employer can offer a plan that pays for or reimburses Medicare Part B or Part D premiums if:

- The plan is integrated with another group health plan offered by the employer that complies with the ACA’s annual dollar limit prohibition and preventive services requirements, does not consist solely of excepted benefits, and provides minimum value;
- The employee is actually enrolled in Medicare Parts A and B;
- The plan is available only to employees enrolled in Medicare Part A, B, or D; and
- The plan is limited to reimbursement of Medicare Part B or Part D premiums and excepted benefits, including Medigap premiums.

Employers still must comply with Medicare secondary payer requirements, which prohibit offering Medicare beneficiaries incentives not to enroll in employer-sponsored coverage that would be primary to Medicare. Therefore, employers should continue to offer active employees the same benefits, and under the same conditions, regardless of Medicare eligibility or age. While Medicare premium reimbursement arrangements generally constitute employer payment plans, an employer payment plan that has fewer than two participants who are current employees (for example, a retiree-only plan) on the first day of the plan year is not subject to the ACA market reforms.

Tricare. An employer can offer an HRA that pays for or reimburses medical expenses for employees covered by TRICARE if:

- The HRA is integrated with another group health plan offered by the employer that complies with the ACA’s annual dollar limit prohibition and preventive services

requirements, does not consist solely of excepted benefits, and provides minimum value;

- The employee is actually enrolled in TRICARE;
- The HRA is available only to employees enrolled in TRICARE; and
- The HRA is limited to reimbursement of cost sharing and excepted benefits, including TRICARE supplemental premiums.

Employers still must comply with the prohibition on offering financial or other incentives for TRICARE-eligible employees to decline employer-provided health coverage.

Transition Relief. Notice 2015-17 also recognizes that some employers that had been offering health coverage through an employer payment plan may need additional time to obtain group health coverage or adopt a suitable alternative. Therefore, Notice 2015-17 also provides:

- limited transition relief from the assessment of the excise tax through June 30, 2015 for small employers (i.e., fewer than 50 full-time equivalents) that offered plans reimbursing employees for individual health policies or Medicare Part B or Part D premiums (giving these employers time to end their employee payment plans and move to group health plans that meet the ACA's market reforms), and clarifies that the relief does not extend to stand-alone HRAs or other arrangements to reimburse employees for medical expenses other than insurance premiums; and
- relief from applicable penalties through at least 2015 for S corporations that pay for or reimburse premiums for individual health insurance covering 2% shareholder-employees (tax law already treats that as imputed income for the shareholder, who also has the authority to deduct 100% of those costs from their income taxes).

Employers considering or offering premium reimbursement arrangements or similar employer payment plan arrangements are advised to consult knowledgeable counsel to ensure full compliance with the law. More information is available in [Technical Release 2013-03](#), the [ACA FAQs](#), and [IRS Q&As](#). Should you have questions about this or any aspect of federal health insurance reform, contact your Conner Strong & Buckelew account representative toll free at 1-877-861-3220. For a complete list of Legislative Updates issued by Conner Strong & Buckelew, visit our online [Resource Center](#).



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