

Health and Welfare Plans: Big Compliance Burdens, Big Penalty Exposures

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Health and welfare have been around for a long time, and they are ubiquitous. Employees have come to expect medical, dental, life, and other insurance as part of their benefits packages. Employers offer coverage in order to reward employees, attract the best talent, and now, under the Affordable Care Act, avoid penalties. Historically, these plans posed few regulatory concerns for employers, despite that the applicable laws and regulations have become increasingly complicated with each passing decade. With the enactment of the Affordable Care Act, however, the applicable legal and regulatory concerns have reached a tipping point. The burdens of compliance and the penalties for non-compliance are now more ominous than ever. This post examines the compliance environment of health and welfare plans generally and group health plans in particular.

An employer who offers benefits must also meet the requirements of a number of laws including the Affordable Care Act, ERISA, the Internal Revenue Code, HIPAA, the Public Health Service Act, and state insurance laws. These laws vary depending on the type and size of plan and may require governmental reporting, disclosures and notices to participants, administrative practices (such as claims processes) and mandated coverages.

As we discussed in our [prior post](#), a welfare wrap document can help employers satisfy many of these requirements. But what if an employer fails to meet its health and welfare plan legal requirements? Here are some of the key penalties:

Summary Plan Description (SPD). If a plan sponsor fails to furnish an SPD to a participant within 30 days of the participant making a request for the document, the plan sponsor may be liable to the participant for a civil penalty of up to \$110 a day from the date of the failure. A participant, beneficiary, or the Secretary of Labor may also bring a civil action against an employer under ERISA.

COBRA. Failure to comply with COBRA (including COBRA's notice requirements) may be imposed under both ERISA and the Internal Revenue Code.

- **ERISA:** A plan administrator who fails to provide COBRA notices to a participant within 30 days of the participant making a request for the document may be liable to the participant for a civil penalty of up to \$110 a day from the date of the failure. In addition, a participant, beneficiary or the Secretary of Labor may bring a civil action against a plan sponsor under ERISA.
- **Internal Revenue Code:** Under the Code, a plan administrator may be assessed with a penalty of \$100 per qualified beneficiary for each day of noncompliance.

Federal Insurance Market Reforms. These reforms are generally applicable to major medical plans and appear in ERISA, the Internal Revenue Code and the Public Health Service Act. Failure to satisfy the reforms' requirements could lead to enforcement and penalties under all three laws. All plans, whether insured or self-insured, are exposed to a penalty of up to \$100 per person per day of noncompliance under the Internal Revenue Code for noncompliance. Insured plans are also subject to enforcement by the Department of Health and Human Services. Generally, HHS defers to the states to enforce these provisions; however, if a state does not take action, HHS can step in and impose a penalty of up to \$100 per day of noncompliance, per individual. Finally, under ERISA, plans are exposed to civil enforcement suits under ERISA. Here are the highlights of these reforms (not an exhaustive list):

- Prohibitions on discrimination against individual participants and beneficiaries based on health status, including based on genetic information;
- Standards relating to benefits for mothers and newborns;
- Mental health parity standards;
- Required coverage for reconstructive surgery following mastectomies;
- Mandated coverage of children up to age 26;

- Prohibitions on annual and lifetime limits, pre-existing condition limitations, and retroactive rescissions of coverage;
- Requirement to prepare and distribute a summary of benefits and coverage; and
- Mandated preventive care.

Form 5500. The Secretary of Labor may assess a civil penalty against of up to \$1,100 a day from the date of a plan sponsor's refusal or failure to file a 5500. (Note that small plans may be exempt.)

Affordable Care Act "Employer Shared Responsibility" mandate. An employer who fails to offer medical coverage to its full time employees (or, who offers insufficient coverage) is exposed to penalties under Code Section 4980H. These penalties can run up to \$167/month (\$2000/year) per full-time employee (excluding the first 30 full time employees) and apply to employers with at least 50 employees. . Note also that employers who fail to meet new related reporting and disclosure requirements under Code Section 6055 and 6056 face penalties of up to \$250 *per return*. These rules are highly complicated and technical, and are discussed at length in our [ACA compliance series](#).

And as if the above weren't already daunting enough, most employers' general liability policies do not cover these sorts of penalties, taxes and losses. Thus, compliance is of the essence.

What's an employer to do?

With all of these requirements, it can be hard to know where to start. One great way to handle many of an employer's disclosure obligations is by using a welfare wrap document. This is a document that contains all of the "bells and whistles" required for an ERISA SPD, as well as certain other disclosures required under ERISA and COBRA. The wrap document also incorporates the certificates and booklets of each benefit by reference, thereby creating a complete SPD. By using a wrap document, an employer can satisfy the ERISA SPD requirement, and many other disclosure requirements, by using one document for all of the employer's health and welfare benefits.

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