



eActionAlert

Reason for this Alert → Self-Reporting of Single-Employer Welfare Plan Compliance Failures is Formalized

March 1, 2010 – The formalization of the self-reporting of compliance failures became effective January 1, 2010. This means that **all group health plan sponsors are now required to assess their compliance with COBRA, HIPAA and other regulations and report compliance failures to the IRS**. Because this is such a significant issue, we've prepared the following chart to help our clients assess the impact on their companies. Additional information can be found in the forms available at the websites listed at the end of this eActionAlert.

Compliance topic	Penalty for failure to comply ⁱ	Due date and Reporting Form
COBRA	Excise tax of \$100 per day, per affected beneficiary. Note that a civil monetary penalty of \$110 per day may also apply. (See Notes 1 and 2 on the next page.)	The due date is the date that the Federal Income Tax return is due – the 15 th day of the 3 rd month following the year end. Reporting is done with the IRS Form 8928.
HIPAA et al – i.e., pre-ex, Creditable Coverage, special enrollment rights, HIPAA health plan discrimination, genetic information and mental health and substance abuse parity	Excise tax of \$100 per day per affected beneficiary. (See Notes 1 and 2 on the next page.)	The due date is the date that the federal income tax return is due – the 15 th day of the 3 rd month following the year end. Reporting is done with the IRS Form 8928.
Archer Medical Savings Accounts (i.e., comparability failure)	35% of Archer MSA contributed by employer in error. (See Note 1 on the next page.)	The due date is the 15 th day of the 4 th month following the last day of the calendar year in which the contributions were made. Reporting is done with the IRS Form 8928.
Health Savings Account (HSA) - (i.e., comparability failure)	35% of HSA contributed by employer in error. (See Note 1 on the next page.)	The due date is the 15 th day of the 4 th month following the last day of the calendar year in which the contributions were made. Reporting is done with the IRS Form 8928.

Notes:

1. Significant penalties and interest may apply for the failure to file or for late filing. See the instructions for more details.
2. An extension to file a corporate return does NOT extend the Form 8928 filing deadline. Also note that exceptions exist (i.e., plan participant count, excepted benefits) relative to COBRA and HIPAA-related excise taxes, where such laws apply.

ⁱ Assumes reasonable cause and not willful neglect

Avoiding certain penalties

Excise taxes resulting from violations associated with group welfare plans (other than for HSAs and MSAs) can be avoided if:

- (1) The employer was unaware of the infraction with reasonable due diligence;
- (2) If the violation was not a result of willful neglect; and
- (3) The failure is corrected within 30 days of "discovery" with affected individuals placed in the same position as if the violation did not occur.

Other exceptions apply for small plans and government plans. For violations associated with the failure to make comparable contributions for HSAs and Archer MSAs, the excise tax can be waived (in whole or in part) if:

- (1) The amount of the excise tax is deemed excessive by the IRS upon appeal relative to the failure involved, and
- (2) The violation is not due to willful neglect.

What this Means to You and M&A's Recommendations

Action items

- Discuss the new rules with M&A.
- Document with vendors the delegation of responsibilities for the tracking of violations and the preparation of the forms, if needed.
- To the extent that new individuals or entities are involved, make certain that they are covered by your HIPAA Policy and Procedures or an updated Business Associate's Agreement.
- Conduct audits at least annually of the data and processes involved and make necessary corrections immediately.

For Form and Instructions:

The Form 8928 is located at:

<http://www.irs.gov/pub/irs-pdf/f8928.pdf>

The Instructions are located at:

<http://www.irs.gov/pub/irs-pdf/i8928.pdf>

For Your Consideration

This may be an excellent opportunity for us to help you with your review of these compliance issues and areas of potential exposure. Call your M&A benefits consultant today!

M&A is an employee benefit consulting and management firm and, as such, we do not practice law. However, if you have any questions about any of the information contained in this eAlert, please contact your Senior Consultant at (877) 564-4300.