

Health Care Reform Update

Relief for Non-Grandfathered Insured Health Plans – Enforcement of the Section 105(h) Nondiscrimination Rule Delayed

Section 2716 of the Patient Protection and Affordable Care Act (PPACA) provides that an insured, non-grandfathered group health plan is subject to “rules similar to” the nondiscrimination rules under Internal Revenue Code Section 105(h). Briefly, the Section 105(h) rules prohibit discrimination in favor of Highly Compensated Individuals as to eligibility and benefits offered under the health plan. This provision is effective for the first plan year that begins on or after September 23, 2010 (January 1, 2011 for calendar-year plans).

Generally, insured non-grandfathered group health plans that fail to comply with the nondiscrimination rules may be subject to an excise tax (\$100 per day per individual discriminated against), civil money penalty¹, or a civil action to compel the plan to provide nondiscriminatory benefits or other appropriate equitable relief under Part 5 of ERISA.²

However, in light of comments expressing significant concerns about a plan sponsor’s ability to comply with these rules without regulatory guidance, the Departments of Labor, the Treasury (IRS), and Health and Human Services (collectively, the Departments) have determined that compliance is not required (and thus, any sanctions for failure to comply do not apply) until after regulations or other administrative guidance are issued. Further, the Departments anticipate that once guidance is released, the nondiscrimination requirements will not apply until the first plan year that begins after some specified period following issuance of guidance.

This relief from enforcement is limited to insured non-grandfathered plans subject to the nondiscrimination requirement under Section 2716 of the PPACA. It does not apply to self-insured group health plans. Self-insured group health plans, regardless of grandfathered status, must continue to comply with the nondiscrimination requirements under Section 105(h).

The Departments also request additional public comment on the issues that should be addressed in future guidance concerning the application of 105(h) rules to insured non-grandfathered plans. Comments are due by March 11, 2011 and guidance is expected to be issued at some point after that date.

For more information on the enforcement delay and how to submit comments, see IRS Notice 2011-1, <http://www.irs.gov/pub/irs-drop/n-11-01.pdf>.

¹ A civil money penalty under title XXVII of the PHS Act may apply in the case of a non-Federal governmental group health plan (generally up to \$100 per day per individual for each day the plan does not comply with the requirement).

² If a self-insured plan fails to comply with Section 105(h), the highly compensated individuals lose a tax benefit.



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