

Health Care Premium Reimbursement Arrangements - Part Deux

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Last November, **Department of Labor** published a new FAQ which stated, in general, that where an employer provides cash reimbursements to employees for the purchase of an individual market health care policy or provides cash in lieu of coverage to employees with high claims risks, such action would be considered part of a plan, fund or arrangement governed by the **Affordable Care Act ("ACA")**. Because these arrangements — by their nature — can never comply with the ACA group health plan provisions, they may subject employers providing such arrangements to penalties.

Earlier this year, the **IRS** issued **Notice 2015-17** reemphasizing that where an employer provides reimbursements or payments, either pre-tax or post-tax, that are dedicated to providing medical care — such as cash reimbursement for the purchase of an individual market policy — such an arrangement is itself a group health plan. And because such an arrangement fails to satisfy market reforms, it may trigger a \$100/day excise tax per applicable employee (which is \$36,500 per year, per employee) under IRC Section 4980D.

But, what about **COBRA** reimbursements? COBRA reimbursements should be allowed so long as the reimbursements are for group health coverage that otherwise complies with the ACA market reforms. However, for terminating employees, keep in mind that the end of a subsidized or reimbursed COBRA premium period is not a special enrollment event — such as loss of coverage due to termination of employment, reduction in hours or the end of a COBRA continuation period — which would allow the employee immediate access to health insurance marketplace coverage. Thus, the employee needs to be mindful of how to coordinate COBRA coverage with the next marketplace open enrollment, or subsidized COBRA may not prove to be particularly beneficial.

For new employees, coverage under a prior employer's group health plan is often continued under COBRA for a period of time. Again, it is important to be sure that the underlying plan is ACA compliant. In addition, if you are the new employer, you still have the obligation — without regard to any COBRA continuation coverage a new employee may have — to offer coverage under your own group health plan within 90 days or possibly be subject to the ACA's shared responsibility penalty.

Bottom line: Any direct or indirect, pre-tax or post-tax employer reimbursement for individual health insurance premiums could subject an employer to some big penalties. For now, COBRA premium reimbursement is permissible so long as the underlying plan is ACA compliant.

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