

## Reporting and Paying Excise Taxes on Group Health Plan Compliance Failures

**If you have any questions about these mandates, please contact one of the following, or your Vorys relationship attorney:**

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Many mandates imposed on group health plans are part of both the Employee Retirement Income Security Act (ERISA) and the Internal Revenue Code (the Code). ERISA and the Code generally include the same substantive requirements, but result in different liabilities for compliance failures. Under ERISA, a significant potential liability in connection with a compliance failure is that a plan participant may bring suit. Under the Code, the same compliance failure may be subject to an excise tax. Up to now, the excise taxes would have been imposed in connection with an IRS audit.

Starting in 2010, the excise tax on certain group health plan compliance failures will need to be self-reported. On September 8, 2009, the IRS published final regulations (74 Fed. Reg. 45994-46000) that for the first time specify how the excise tax is to be paid in the event of a failure to comply with the following mandates:

- COBRA
- HIPAA portability requirements
- Genetic Information Nondiscrimination Act
- Newborns and Mothers' Health Protection Act
- Mental Health Parity and Addiction Equity Act
- Michelle's Law

The excise tax for a COBRA violation is \$100 per day during a period of

noncompliance (\$200 per day if two or more qualified beneficiaries are involved). A period of noncompliance starts on the date that the failure to comply with COBRA occurs and ends when the failure is corrected or, if later, six months after the expiration of the COBRA period. The excise tax for a violation of the other listed mandates is \$100 per day during a period of noncompliance for each individual to whom the failure relates.

The excise tax does not apply where failure was not discovered and would not have been discovered by exercising reasonable diligence. Also, the excise tax does not apply if a failure is due to reasonable cause (not willful neglect) and the failure is corrected within 30 days after the employer first knew (or, in exercising reasonable diligence, should have known) of the failure. Note that the excise tax for the mandates other than COBRA does not apply to certain small employers (generally, an employer with not more than 50 employees) with insured group health plans when the failure is caused solely by the health insurance coverage offered by the insurer.

The excise tax is reported on Form 8928. The deadline for excise tax reporting and payment is the employer's federal income tax return due date without extensions. The new filing requirements apply to Form 8928s that are due on or after January 1, 2010.

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