

Legislative Brief

Form 8928 – Compliance Failures



Form 8928 - What does this mean for you?

Beginning with the 2010 Plan or taxable year, employers are now required to self-report their failures to comply with COBRA, HIPAA and other health plan regulations to the IRS on Form 8928 and pay excise taxes and penalties for these compliance failures. The form can be found on the IRS' website www.irs.gov/pub/irs-pdf/i8928.pdf. Instruction for filling out the form can be found at www.irs.gov/pub/irs-pdf/i8928.pdf.

Excise Tax Amount

The excise tax varies based on the type of violation. The excise tax for COBRA violations and other group health plan failures is generally \$100 per day per affected individual during the "noncompliance period." The noncompliance period for COBRA violations starts on the date of the failure and continues until the earlier of the date the failure is corrected, or at the latest, the date that is six months after the maximum period of coverage that would apply to the qualified beneficiary. With respect to other health plan violations, the "noncompliance period" continues until the failure is corrected.

For COBRA, the excise tax is assessed per qualified beneficiary, but is limited to \$200 for the total number of qualified beneficiaries in a family. The excise tax is assessed **in addition to** any ERISA penalties for late notices. There is also a per plan, per year limitation for violations due to reasonable cause and not to willful neglect that is the lesser of \$500,000 or 10% of the aggregate paid by the employer in the prior year for group health plans. This cap applies to COBRA violations and to other health plan violations. There is a similar limitation for multiemployer plans.

Example: A COBRA election notice was due on 3/1/10 but was not provided until 5/10/10 (70 days late). There are 4 QBs in the coverage group (terminated employee, spouse, and 2 children). The possible excise tax amount is \$200 x 70 days = \$14,000.

Relief for Inadvertent Errors

1. Inadvertent Errors. With respect to COBRA and other applicable health plan requirements, the excise tax will not apply during any period that the responsible entity didn't know of the failure, or by exercising reasonable diligence would not have known of the failure.
2. Grace Period for Correction. The tax also does not apply to cases where the failure was due to "reasonable cause" and not "willful neglect," and was corrected within 30 days of the date the responsible entity knew or, by exercise of reasonable diligence, should have known of the failure. Form 8928 has a separate line to report that the failure was not discovered despite due diligence or was corrected within the correction period.
3. Definition of Correction. A failure is treated as corrected if the failure is retroactively undone to the extent possible, and the qualified beneficiary is placed in a financial position comparable to the position he or she would have been in had the failure not occurred.

The IRS may waive part or all of the excise tax to the extent that payment of the tax would be excessive relative to the failure involved. This applies only to failures due to reasonable cause and not due to willful neglect.

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Compliance Suggestions

Plan sponsors should adopt and follow procedures for compliance with these laws. For example, many plan sponsors outsource a large portion of their COBRA administration. However, a COBRA compliance failure often originates because the employer has not notified the COBRA administrator that a qualifying event has occurred. A common example is where an employer fails to realize that an employee on a medical leave of absence that extends beyond the FMLA period has ceased to satisfy the service requirement to maintain eligibility and should be offered COBRA. Therefore, it is recommended that clients have COBRA procedures in place to ensure that proper notification is delivered to their COBRA administrator on a timely basis for all COBRA qualifying events.

Use of regular compliance procedures and checklists may be helpful in proving that a compliance failure was due to "reasonable cause" (e.g., human error in following an established procedure) rather than "willful neglect" (e.g., ignoring compliance obligations). When an error is discovered, the error should be corrected as soon as possible. Documentation of the correction should be retained in plan files.

If you have any questions regarding Form 8928 or excise tax compliance, please contact your SullivanCurtisMonroe Insurance Services, LLC representative.