

4980D Small Business Excise Tax Liability

BY TONY NOVAK, CPA

The Affordable Care Act added Section 9815 to the Internal Revenue Code, which requires employer-provided health plans to comply with a number of market reform provisions. Internal Revenue Service (IRS) Notice 2013-54 explains that some of the most popular health benefit arrangements used by small businesses violate market reform provisions. The most common examples of non-compliance are an employer's payment for individual health insurance or payment of health benefits that are not integrated with an employer-sponsored group health insurance plan.

Employer-paid health benefits for common law employees must now be integrated with a qualified employer-sponsored group health insurance policy, excepted by law or subject to an excise tax penalty. There are exceptions for one-person businesses, S corporation shareholder employees, church plans and union plans.

The excise tax penalty for small business employers took effect in January 2015. IRS Notice 2015-17 delayed enforcement of the excise penalty during a correction period that extended until June 2015. Efforts to repeal implementation of this potentially harsh penalty have thus far failed.

New Reporting Requirements

Self-report excise taxes payable by a small business employer under IRC 4890D on Form 8928, Part 2, which must be filed by the due date of the 2015 return, including extension.

There are two types of excise tax penalties: Section A – Failures Due to Reasonable Cause and Not to Willful Neglect, and Section B – Failures

Due to Willful Neglect or Otherwise Not Due to Reasonable Cause. The Section A penalty is 10 percent of the total amount paid for employee health benefits for affected employees. The Section B penalty is a potentially larger \$100-per-employee per-day excise tax.

We presume that for 2015 some impacted employers will take the position that the failure was not discovered, despite exercising reasonable diligence, or was corrected within the correction period and was due to reasonable cause. If so, then the Section A penalty would apply for 2015.

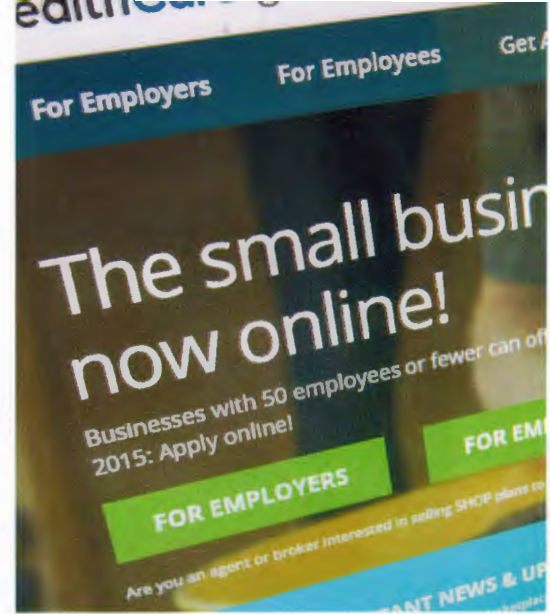
Recognizing a Penalty Situation

Employers and their tax preparers should look for and address arrangements that may trigger an excise tax. Watch for these common warning signs that may indicate exposure to 4890D excise tax liability:

- Lack of health plan documents or documents that have not been updated since before ACA implementation.
- Commercially marketed “workaround” arrangements that use wording like “Section 105 Plan.”
- Employer payments for individual health insurance premiums.
- Employer payments for health care expenses that are not administered together with the group health insurance policy.

Penalty Relief

The IRS issued relief from this penalty to small business employers with non-compliant health plans for the first six months of the year (IRS Notice 2015-17). As such, the Section 4980D penalty would apply to health benefits beginning July 1, 2015, through



December 31, 2015. For example: If an employer made a payment to a single employee for health benefits of \$300 per month for all of 2015, then the tax under Section A would only be \$180 (10 percent of \$300 x six months), but the tax under Section B would be \$18,400 (\$100 per day for 184 days). It appears that in the most common types of small-business health-plan violation scenarios a strong statutory argument could be made for the more severe Section B penalty.

The IRS can grant penalty relief in this matter. Given the severity of the Section B penalty, and its potential to even bankrupt some small employers, we presume that the IRS may liberally concede to accept a Section A penalty from affected small business employers for 2015. However, once an employer claims an unintentional violation for 2015 and assumes the lower Section A penalty, it appears unlikely that the employer could continue to claim that the very same violation was unintentional again on the 2016 tax return. Thus, it may be urgent to correct the non-compliant provisions in the underlying health benefit plans that are triggering the excise tax as early as possible, and certainly before the 2015 tax return filing date in early 2016. 📧

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