

Compliance Date Postponed for Insured Group Health Plan Discrimination Rules

On December 22, 2010, welcome further guidance on open questions under the *Patient Protection and Affordable Care Act* was issued by the U.S. Departments of Labor, Health and Human Services, and Treasury. Most notably, IRS Notice 2011-1 postpones the application and enforcement of the provisions prohibiting fully-insured group health plans from discriminating in favor of highly compensated individuals. The latest installment in a series of FAQs also addresses a wide range of other questions relating to the Affordable Care Act's implementation.

Notice 2011-1

Section 2716 of the *Public Health Service Act* provides that fully-insured group health plans must satisfy the requirements of Internal Revenue Code section 105(h)(2), which prohibits self-insured medical plans from discriminating in favor of highly compensated individuals with respect to eligibility or benefits. Section 2716 also provides that rules similar to certain of the current rules under section 105(h) will now apply to fully-insured plans – with the difference that the penalty for failure to comply, rather than resulting in income inclusion for the highly compensated employee, is a potentially significant excise tax on the employer or a civil action to enjoin the noncompliant practice or for other equitable relief under ERISA.

There has been a great deal of discussion about how Section 2716 is intended to apply, and in particular, what rules “similar to” those in sections 105(h)(3), (4), and (8) might require of employers. The uncertainty surrounding the application of Section 2716 and the risks associated with non-compliance have prompted many employers to ask whether they have to act immediately to overhaul group health plans, executive employment agreements, and post-employment medical benefits. Notice 2011-1 makes clear that employers are not yet required to undertake such modifications, and do not have to comply with Section 2716 until specific requirements are spelled out in regulations or other administrative guidance. The Notice also states that such guidance is anticipated to apply only prospectively and only after plan sponsors have been given time to implement any required changes.

The Departments are seeking comments on a number of issues, including what the term “benefits” should include, whether nondiscrimination standards may be applied separately in distinct geographic locations, what safe harbor plan designs might be offered, whether coverage provided on an after-tax basis should be disregarded in applying the rules, what transition rules might be needed for mergers, acquisitions or other corporate transactions, and how the penalties should be applied. Comments are due by March 11, 2011.

FAQs

The Departments also issued the fifth in a series of FAQs on implementation of the Affordable Care Act. The FAQs (available [here](#)) address the following topics, among others:

- How a group health plan may use reasonable medical management techniques to control costs for preventive care.

- Whether an insurer may screen applicants before offering a child-only policy.
- When a fixed-amount cost sharing requirement (e.g., a deductible or out-of-pocket limit) based on a percentage of compensation will not cause a plan to lose grandfather status as a result of compensation increases.
- The impact of the Affordable Care Act on certain requirements under the Mental Health Parity and Addiction Equity Act of 2008.
- Questions regarding the design of wellness programs and the pending increase in the maximum reward under a health-contingent wellness program to 30 percent of premium cost.

In addition, the FAQs clarify that employers will not be required to roll out automatic health plan enrollment until regulations are issued, and that group health plans and health insurers are not required to comply with the 60-day prior notice requirement for material modifications to plans or policies until plans and issuers are required to provide summaries of benefits and coverage explanations pursuant to standards to be issued by the Departments. Those standards are due to be published by March 23, 2011, and compliance will be required not later than March 23, 2012.

If you have any questions about the nondiscrimination rules, the FAQs, or Affordable Care Act implementation generally, please contact a member of the Ropes & Gray [Employee Benefits](#) practice or your usual Ropes & Gray advisor. For access to other information about the Affordable Care Act, please visit the Ropes & Gray [Health Reform Resource Center](#).

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