



# COMPLIANCE UPDATE

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## DEPARTMENT OF LABOR CONFIRMS THAT EMPLOYERS MAY NOT PAY FOR EMPLOYEES IN EXCHANGES ON A PRE- OR POST-TAX BASIS

On November 6, 2014, the Department of Labor (“DOL”) issued FAQ Part 22 (FAQs about Affordable Care Act Implementation (Part XXII))<sup>1</sup>. This FAQ directly addressed the efforts by some employers to reimburse employees for participation in the Marketplace / Exchange through a Code Section 105 (HRA) arrangement, or through some other type of arrangement. The recent FAQ, coupled with the prior guidance on the topic<sup>2</sup>, makes clear that such arrangements will not be permitted on a pretax or post-tax basis. The following is a summary of the newest guidance:

- ◆ An employer may not use an arrangement that provides cash reimbursement of an individual market policy on either a pretax or post-tax basis. Such an arrangement constitutes a group health plan that fails to comply with market reforms because the cash payment cannot be integrated with an individual market policy.
- ◆ An employer may not offer employees with high claims risk a choice between enrollment in the standard group health plan or cash as it violates market reforms and is discriminatory.
- ◆ A product, marketed to employers by certain vendors, that claims that employers can cancel their group policies, set up a Code section 105 reimbursement plan that works with health insurance brokers or agents to help employees select individual insurance policies, and allow eligible employees to access the premium tax credits for Marketplace coverage is not permissible.
  - ◇ These arrangements are group health plans making the employees, participating in such arrangements, ineligible for premium tax credits for Marketplace coverage. The mere fact that the employer does not involve itself with the employee’s individual selection or purchase of the individual policy does not prevent this type of arrangement from being a group health plan.

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<sup>1</sup> <http://www.dol.gov/ebsa/faqs/faq-aca22.html>

<sup>2</sup> <http://www.irs.gov/pub/irs-drop/n-13-54.pdf>

<http://www.irs.gov/uac/Newsroom/Employer-Health-Care-Arrangements>

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- ◇ Such arrangements, as they are group health plans, are also subject to the market reforms provisions of the Affordable Care Act (“ACA”). Such market reforms include the prohibition on annual limits and the requirement to provide certain preventive services without cost sharing. These types of arrangements cannot be integrated with individual market policies to satisfy market reforms and therefore will violate ACA.
- ◇ Violation of the ACA in this manner can trigger penalties such as excise taxes under section 4980D of the IRS Code<sup>3</sup>. Such excise taxes can reach up to \$100 per day per applicable employee, which could total \$36,500 per year per employee. Employers could also face additional liability in the form penalties from any enforcement by the Department of Labor for violation of market reforms such as the violation of the prohibition of annual limits or first dollar coverage of preventive care.

Groups should be very cautious of any arrangements whereby they simply pay for their employees to participate in the Marketplace/Exchange. This new guidance, couple with the already existing guidance, makes it clear that the various governmental agencies are giving close scrutiny to these types of arrangements.

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<sup>3</sup> <http://www.gpo.gov/fdsys/pkg/USCODE-2011-title26/pdf/USCODE-2011-title26-subtitleD-chap43-sec4980D.pdf>

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