



Compliance Alert

New Guidance for Employer Payment of Individual Premiums

February 27, 2015

Quick Facts:

- IRS Notice 2015-17 reiterates that all “employer payment plans” are prohibited.
- Employer payment plans can subject the employer to an excise tax of \$100 per day per applicable employee.
- Transition relief from the excise tax is provided for some employers.
- The notice clarifies tax treatment and other issues for employer payment plans.

In the past, many employers have helped employees pay for individual health insurance policies instead of offering a group insurance plan. In recent months, the Departments of Labor (DOL), Health and Human Services (HHS) and the Treasury (Agencies) have released several pieces of guidance addressing arrangements (referred to as “employer payment plans”) under which the employer reimburses or pays premiums for an employee’s individual health insurance policy.

According to this guidance, employer payment plans do not comply with several Affordable Care Act (ACA) provisions that took effect beginning in 2014. Violations of these rules can result in the employer becoming subject to excise taxes of \$100 per day per applicable employee.

IRS Notice 2015-17

On February 18, 2015, the Internal Revenue Service (IRS) issued [Notice 2015-17](#). The notice:

- reiterates that employer payment plans are group health plans that do not comply with the ACA’s market reforms applicable to group health plans;
- clarifies that increases in employee compensation do not constitute an employer payment plan, as long as the increases are not conditioned on the purchase of individual health coverage;
- provides short-term transition relief from the excise tax for small employers that pay or reimburse individual health policy premiums for employees;
- addresses whether employers may reimburse Medicare premiums or TRICARE expenses for active employees under the ACA; and



- provides relief until further notice from the excise tax for S corporation healthcare arrangements for 2-percent shareholder employees;
- states that employer payments for individual premiums may be excludable from an employee's income under the tax code, but will still violate the ACA's market reforms.

The Agencies noted that they expect to issue further clarifications regarding other aspects of employer payment plans and HRAs in the near future.

Increases in employee compensation

Notice 2015-17 clarifies that, if an employer increases an employee's compensation, but does not condition the additional compensation on the purchase of health coverage (or otherwise endorse a particular policy, form or issuer of health insurance), it is not considered an employer payment plan.

According to the IRS, providing employees with information about the public Marketplace (Exchange) or the premium tax credit is not endorsement of a particular policy, form or issuer of health insurance. Because this type of arrangement generally will not constitute a group health plan, it is not subject to the ACA's market reforms.

Excise tax delay for small employers

Small employers have often helped employees pay for individual coverage. As noted above, starting in 2014, these employers would normally be subject to an excise tax of \$100 per day for each employee.

Notice 2015-17 provides a delay in the excise tax penalty for employers that are not applicable large employers (ALEs) under the ACA's employer shared responsibility rules. (An ALE generally is an employer with 50 or more full-time and full-time-equivalent employees.) Therefore, an excise tax will not be assessed for violations of the ACA's market reforms by small employer payment plans that pay (or reimburse employees) for individual health policy premiums.

This transition relief is available on a temporary basis. Employers may be eligible for relief from the excise tax as late as June 30, 2015. Specifically:

- For 2014, the relief applies to employers that are not ALEs for 2014 (based on employer size in 2013).
- For January 1 to June 30, 2015, the relief applies to employers that are not ALEs for 2015 (based on employer size in 2014).

After June 30, 2015, employers of all sizes will be liable for excise taxes if they pay or reimburse individual health insurance premiums.

Employers eligible for this relief are not required to file IRS Form 8928 (to report failures to satisfy requirements for group health plans) as a result of having these arrangements during the period for which the employer is eligible for the relief.



Important: This relief does not extend to stand-alone HRAs or other arrangements that reimburse employees for medical expenses other than insurance premiums.

Reimbursement of Medicare and TRICARE premiums

Notice 2015-17 notes that an arrangement under which an employer reimburses (or pays directly) some or all of Medicare Part B or Part D premiums for employees constitutes an employer payment plan. Similarly, an arrangement under which an employer reimburses (or pays directly) some or all of medical expenses for employees covered by TRICARE constitutes an HRA. In both cases, if the arrangement covers two or more active employees, it is a group health plan subject to the ACA's market reforms.

An employer payment plan or an HRA may not be integrated with Medicare coverage or TRICARE to satisfy the market reforms, because Medicare coverage and TRICARE are not group health plans for integration purposes.

However, an employer payment plan or HRA that pays for or reimburses Medicare Part B or Part D premiums, or medical expenses for employees covered by TRICARE, is integrated with another group health plan offered by the employer for purposes of the market reforms if:

- the employer offers a group health plan (other than the employer payment plan or HRA) to the employee that does not consist solely of excepted benefits and offers coverage providing minimum value;
- the employee participating in the employer payment plan or HRA is actually enrolled in Medicare Parts A and B or TRICARE;
- the employer payment plan or HRA is available only to employees who are enrolled in Medicare Part A and Part B or Part D, or TRICARE; and
- the employer payment plan or HRA is limited to reimbursement of Medicare Part B or Part D premiums, or cost-sharing, and excepted benefits, including Medigap premiums or TRICARE supplemental premiums.

Note that, to the extent that this type of arrangement is available to active employees, it may be subject to restrictions under other laws, such as the Medicare secondary payer provisions or laws that prohibit offering financial or other incentives for TRICARE-eligible employees to decline employer-provided group health plan coverage, similar to the Medicare secondary payer rules.

An employer payment plan that has fewer than two participants who are current employees (for example, a retiree-only plan) on the first day of the plan year is not subject to the market reforms, and, therefore, integration is not necessary to satisfy the market reforms.

Also, an employer may provide more than one type of healthcare arrangement for its employees (for example, a Medicare Part B employer payment plan and a TRICARE-related HRA), provided that each arrangement meets the applicable integration or other rules.



S Corporation healthcare arrangements for 2-percent shareholder-employees

Under [IRS Notice 2008-1](#), if an S corporation pays for (or reimburses) premiums for individual health insurance coverage covering a 2-percent shareholder, the payment or reimbursement is included in income, but the 2-percent shareholder-employee may deduct the amount of the premiums (provided that all other eligibility criteria for deductibility are satisfied).

Notice 2015-17 refers to this as a 2-percent shareholder-employee healthcare arrangement.

The Agencies stated that they may issue additional guidance on the application of the market reforms to a 2-percent shareholder-employee healthcare arrangement. However, until further guidance is issued (and at least through the end of 2015), the excise tax will not be assessed for any failure to satisfy the market reforms by a 2-percent shareholder-employee healthcare arrangement.

Furthermore, until additional guidance provides otherwise, an S corporation with a 2-percent shareholder-employee healthcare arrangement will not be required to file IRS Form 8928 (regarding failures to satisfy requirements for group health plans, including the market reforms) solely as a result of having a 2-percent shareholder-employee healthcare arrangement.

However, this guidance does not apply to reimbursements of individual health insurance coverage with respect to employees of an S corporation who are not 2-percent shareholders.

The IRS is also considering whether additional guidance is needed on the federal tax treatment of 2-percent shareholder-employee healthcare arrangements. However, until additional guidance provides otherwise, taxpayers may continue to rely on Notice 2008-1 with regard to the tax treatment of these arrangements for all federal income and employment tax purposes.

To the extent that a 2-percent shareholder is allowed both the deduction described above and a premium tax credit for coverage through an Exchange, [Revenue Procedure 2014-41](#) provides guidance on calculating the deduction and the credit with respect to the 2-percent shareholder.

Notice 2015-17 also noted, however, that the market reforms do not apply to a group health plan that has fewer than two participants who are current employees on the first day of the plan year. Thus, an arrangement covering only a single employee (whether or not that employee is a 2-percent shareholder-employee) generally is not subject to the market reforms, whether or not the reimbursement arrangement otherwise constitutes a group health plan.

However, if an S corporation maintains more than one of these types of arrangements for different employees (whether or not 2-percent shareholder-employees), all are treated as a single arrangement covering more than one employee, so that this exception does not apply.



Tax treatment of employer reimbursements for individual insurance

The notice also addresses [Revenue Ruling 61-146](#) (Rev. Rul. 61-146), which has been cited by some as authority permitting employer payment plans under the Internal Revenue Code (Code). Under Rev. Rul. 61-146, employer reimbursements of an employee's individual insurance premiums are excluded from the employee's gross income under Code section 106. This exclusion also applies if the employer pays the premiums directly to the insurance company.

According to the IRS, this guidance regarding the tax exclusion continues to apply. This means only that the payments are excludable from the employee's gross income under section 106 (regardless of whether the employer includes the payments as wages on the Form W-2).

However, the IRS stated that Rev. Rul. 61-146 does not address the application of the ACA's market reforms, and should not be read as containing any implication regarding the application of those market reforms.

An arrangement under which an employer provides reimbursements or payments that are dedicated to providing medical care (such as cash reimbursements for the purchase of an individual market policy) is, itself, a group health plan. Accordingly, the arrangement is subject to the ACA's market reform rules applicable to group health plans, without regard to whether the employer treats the money as pre-tax or post-tax to the employee. These employer health care arrangements cannot be integrated with individual market policies to satisfy the market reforms and, therefore, do not comply with the ACA.

The notice supplements two Information Letters previously issued by the IRS Office of Chief Counsel. [Letter 2014-0037](#) and [Letter 2014-0039](#) addressed the ability of employers to reimburse employees' medical expenses with pre-tax dollars under Code section 105. These letters note that, although the ACA has not changed the tax treatment under sections 105 or 106, these arrangements violate the ACA's prohibition on annual limits because they reimburse medical expenses up to a fixed amount.

Prior employer payment plan guidance

- January 24, 2013: Department [FAQs](#) addressed compliance of HRAs with the ACA's market reforms.
- September 13, 2013: [IRS Notice 2013-54](#) and [DOL Technical Release 2013-03](#) clarified that HRAs, certain health FSAs and other employer payment plans are considered group health plans subject to the ACA's market reforms, and they cannot be integrated with individual policies to satisfy those requirements. As a result, effective for 2014 plan years, these plans are essentially prohibited.
- May 13, 2014: IRS [FAQs](#) addressed the consequences for employers that reimburse employees for individual health insurance premiums. These arrangements may trigger an excise tax of \$100 per day for each applicable employee (\$36,500 per year for each employee) under Code section 4980D.
- November 6, 2014: Department [FAQs](#) clarified that employer payment plans do not comply with the ACA's market reforms and may subject employers to penalties, whether provided on a pre- or after-tax basis.



Summary

Notice 2015-17 offers small employers (those with fewer than 50 full-time employees, including full-time equivalent employees) relief from the tax penalties that normally would apply to employers that pay or reimburse individual health policy premiums for employees. This relief is available for:

- 2014, if the employer is not an ALE for 2014 (based on employer size in 2013)
- 2015, if the employer is not an ALE for 2015 (based on employer size in 2014).

Additionally, Notice 2015-17 provides that employer payment plans that pay for or reimburse premiums for Medicare Parts B or D are considered integrated with another group health plan sponsored by the employer, provided certain conditions are met. Employers that reimburse employees for Medicare Part B or Part D premiums, medical expenses for employees covered by TRICARE, or S corporations that pay insurance premiums for a 2-percent shareholder employees, should review such arrangements with their legal and tax advisors to determine whether they constitute an employer payment plan.

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For further information on this or any other topics, please contact your EPIC benefits consulting team.

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