

HEALTH CARE REFORM UPDATE

Employer Compliance Alert

Employee Benefits
December 27, 2010



IRS Delays Application of Nondiscrimination Rules for Insured Health Plans

On December 22, 2010, the Internal Revenue Service announced (in Notice 2011-1) that insured group health plans will not be required to comply with the nondiscrimination requirements under health care reform until some time after the IRS issues regulatory guidance on those requirements.

The Affordable Care Act provides that insured group health plans (other than certain "grandfathered" plans) must satisfy the requirements of Code Section 105(h)(2), which prohibits discrimination in favor of "highly compensated" participants in terms of either (i) eligibility to participate, or (ii) the benefits provided under the plan. The Act specifically provides that the terms "employer" and "highly compensated individual" (or "HCI") have the meanings given under Section 105(h). Prior to the Affordable Care Act, the nondiscrimination requirements of Section 105(h) applied solely to self-insured (i.e., self-funded) plans.

However, the consequences of violating the nondiscrimination requirements are quite different for insured plans.

Code Section 105(h) currently provides that, if a self-insured plan discriminates in favor of one or more HCIs, those individuals will be taxed on some or all of the benefits that they receive under the plan (i.e., those individuals will "lose" the benefit of non-taxable health care reimbursements).

By contrast, if an *insured* plan violates the nondiscrimination rule, there are no tax consequences to the affected HCIs. Instead, the employer/plan sponsor is subject to an excise tax equal to \$100 per day per non-highly compensated individual who is discriminated *against*. The employer may also be subject to a lawsuit by one or more federal agencies (or by the non-highly compensated individuals discriminated against) for the benefits that the non-highly compensated individuals did not receive.

Under the health care reform statute, these new requirements are to apply to non-grandfathered insured plans for plan years beginning on or after September 23, 2010. Thus, absent relief, these new rules would have applied to calendar-year insured plans beginning on January 1, 2011 (and they already apply to certain fiscal-year plans). However, Notice 2011-1 provides that insured plans will not be subject to the new rules – and will not be subject to the \$100 per day per affected non-HCI penalty for violation of the rules – until plan years that begin after the IRS issues guidance on the application of these rules.

The IRS has also requested additional comments on how the Section 105(h) "eligibility" and "benefits" tests should be applied to insured plans. This additional comment period closes on March 11, 2011.

If you have any questions about how the new health care reform requirements apply to your group health plan, please contact your local UBA Member Firm.

Robert A. Browning, Partner
Spencer Fane Britt & Browne LLP

This notification is brought to you by your Member Firm of United Benefit Advisors – a member-owned alliance of more than 140 premier independent benefit advisory firms and one of the nation's five largest employee benefits advisory organizations – and Spencer Fane Britt & Browne LLP, with offices throughout the Midwest and more than a century of experience providing legal counsel. This publication is designed to provide accurate and authoritative information. It is distributed with the understanding that the author, publisher and editors are not rendering legal or other professional advice or opinions on specific matters, and accordingly, assume no liability in connection with its use. The choice of a lawyer is an important decision and should not be made solely upon advertisements. Past results afford no guarantee of future results. Every case is different and must be judged on its own merits.

UBA also co-sponsors an informative webinar series designed to help employers anticipate emerging regulatory issues and stay abreast of the latest human resource trends and best practices. For more information, contact your local UBA Member Firm today.



Shared Wisdom. Powerful Results.®



The content presented in this Employer Compliance Alert is provided by Spencer Fane Britt & Browne LLP. Mesirow Financial makes no warranty, guarantee or representation as to the accuracy, reliability or completeness of the information presented. This document is intended as an overview and should not be viewed or relied upon as legal or tax advice. Please consult with your attorney or tax professional if you have any questions about the legislation discussed herein.

About Mesirow Financial

Mesirow Financial is a diversified financial services firm headquartered in Chicago. Founded in 1937, it is an independent, employee-owned firm with more than \$37 billion in assets under management and 1,200 employees in locations across the country and in London. With expertise in Investment Management, Global Markets, Insurance Services and Consulting, Mesirow Financial strives to meet the financial needs of institutions, public sector entities, corporations and individuals. For more information about Mesirow Financial, visit its Web site at mesirowfinancial.com.

Mesirow Financial refers to Mesirow Financial Holdings, Inc. and its divisions, subsidiaries and affiliates. The Mesirow Financial name and logo are registered service marks of Mesirow Financial Holdings, Inc. © 2010, Mesirow Financial Holdings, Inc. All rights reserved.