



# Employee Benefits Law Information Memo

December 2009

Electronic Dispatch

[Go to BS&K Employee Benefits Law Home Page](#)

## PROCEDURES SHOULD BE IMPLEMENTED TO COMPLY WITH NEW SELF-REPORTING AND EXCISE TAX PAYMENT REQUIREMENTS FOR CERTAIN HEALTH PLAN VIOLATIONS

Starting January 1, 2010, employers and certain other entities that administer group health plans will be required, for the first time, to report on an Internal Revenue Service ("IRS") form certain types of group health plan violations and pay the applicable excise taxes. Violations that must be reported include a failure to satisfy health coverage continuation requirements under the Consolidated Omnibus Budget Reconciliation Act of 1985, as amended ("COBRA"), certain requirements under the Health Insurance Portability and Accountability Act ("HIPAA"), certain mental health benefit parity requirements, childbirth hospital stay requirements, and certain health coverage continuation requirements for seriously ill higher education students. Administrators of group health plans currently are not required to self-report such violations when they are discovered, and the lack of such self-reporting often resulted in any applicable excise taxes not being paid. The IRS has issued regulations that will require such violations to be self-reported, and will require any applicable excise taxes to be paid in a timely manner.

Steps that should be implemented by employers to comply with these new requirements include:

- making sure that employees or other persons who are involved in the administration of each applicable group health plan are informed about these new requirements;
- implementing procedures that will help ensure the timely discovery of applicable group health plan violations, the timely submission of the IRS form reporting such violations, and the timely payment of all applicable excise taxes; and
- to the extent an employer's group health plan is administered by another entity (e.g., a third party administrator, an insurance company or a health maintenance organization), reviewing any agreement with such entity to see if any changes are needed to help ensure compliance with these new requirements.

### Taxpayers Required To Comply With These New Requirements

The new self-reporting and excise tax payment requirements for certain group health plan violations generally apply to: (1) employers who sponsor a group health plan that is subject to the requirements described in the following paragraph ("Covered Health Plan"); (2) unions and other employee organizations who sponsor a Covered Health Plan; (3) third party administrators of Covered Health Plans (e.g., a third party administrator of a self-insured Covered Health Plan); and (4) certain other third parties who are responsible for providing benefits under a Covered Health Plan (e.g., insurance companies or health maintenance organizations).

### Types of Violations That Are Covered By These New Requirements

Violations that must be reported include a failure to comply with the following requirements:

- COBRA Health Coverage Continuation Requirements – Group health plans that are subject to COBRA are required to comply with certain coverage continuation requirements.
- HIPAA Preexisting Condition, Creditable Coverage and Special Enrollment Requirements – Group health plans that are subject to HIPAA are required to, among other things, comply with limitations on preexisting exclusions, certification of creditable coverage requirements, and special enrollment requirements.
- HIPAA Nondiscrimination Requirements Based on Health Status Factors – Group health plans that are subject to HIPAA are not allowed to discriminate based on a health status factor.
- Genetic Information Nondiscrimination Requirement – The Genetic Information Nondiscrimination Act ("GINA") prohibits, among other things, discrimination based on genetic information.

Bond, Schoeneck & King, PLLC ■ New York ■ Albany Buffalo Garden City Ithaca New York Oswego Rochester Syracuse Utica  
■ Kansas ■ Overland Park ■ Florida ■ Naples

This document may be considered "Attorney Advertising" under the rules of some states.  
The hiring of a lawyer is an important decision that should not be based solely upon advertisements.



- Mental Health Parity Requirements – The Mental Health Parity and Addiction Equity Act imposes certain parity requirements between mental health benefits and medical/surgical benefits.
- Childbirth Hospital Stay Requirements – The Newborns' and Mothers' Health Protection Act imposes requirements regarding minimum hospital lengths of stay in connection with childbirth.
- Health Coverage Continuation Requirements for Seriously Ill Higher Education Students – Michelle's Law imposes certain health coverage continuation requirements for dependent university and college students with serious medical conditions.
- Comparable Contribution Requirements for Health Savings Accounts and Medical Savings Accounts – Health savings accounts ("HSAs") and Archer medical savings accounts ("MSAs") are subject to requirements that help ensure that comparable contributions are made for nonhighly compensated employees.

### **Excise Taxes That Apply To Such Violations**

The applicable excise taxes vary depending upon the type of violation involved. An excise tax of \$100 a day per affected beneficiary generally applies to a violation of the COBRA health coverage continuation requirements. An excise tax of \$100 a day per affected individual generally applies to violations of: (1) HIPAA's preexisting condition, creditable coverage, and special enrollment requirements; (2) HIPAA's nondiscrimination requirements based on health status factors; (3) GINA's genetic information nondiscrimination requirement; (4) the mental health parity requirements; (5) the childbirth hospital stay requirements; and (6) the health coverage continuation requirements for seriously ill higher education students. A violation of the comparable contribution requirements for HSAs and MSAs generally will be subject to an excise tax of 35 percent of the aggregate amount contributed to the HSAs or MSAs for all employees within the applicable calendar year.

### **IRS Form That Must be Filed If a Violation Occurs**

If a violation of one of the requirements described above occurs, the applicable employer generally will be required to report that violation on IRS Form 8928 and will be required to pay the applicable excise taxes. If a COBRA health coverage continuation requirement is involved, the applicable third party administrator or insurer could be responsible for filing Form 8928 and paying the applicable excise taxes. If a violation occurs with respect to a multiemployer plan, the plan will be responsible for filing Form 8928 and paying the applicable excise taxes.

### **Deadline For Filing the Required IRS Form and Paying the Applicable Excise Taxes**

For all violations described above other than a violation of the comparable contribution requirements for HSAs and MSAs, a Form 8928 generally must be filed and the applicable excise tax generally must be paid by the due date for filing the federal income tax return for the applicable taxpayer. If a violation of the comparable contribution requirements for HSAs and MSAs occurs, a Form 8928 generally must be filed and the applicable excise tax generally must be paid by April 15<sup>th</sup> of the calendar year that follows the calendar year in which the violation occurred. Special requirements apply with respect to extensions, multiemployer plans, and multiple employer plans.

### **Exceptions To the Excise Tax Requirements**

With respect to all violations described above other than a violation of the comparable contribution requirements for HSAs and MSAs, exceptions to the excise taxes apply:

- if the responsible party did not know, and would not have known even if reasonable diligence had been exercised, that the violation existed; or
- if the violation was due to reasonable cause and not willful neglect, and was corrected within 30 days after the first day the responsible party knew, or exercising due diligence, would have known that the violation had occurred (the violation will be considered corrected if the violation is retroactively undone to the extent reasonably possible and the affected individual is put in a financial position as beneficial as the individual would have been in had the violation not occurred).

If a violation of the comparable contribution requirements for HSAs and MSAs occurs, the IRS can waive the excise tax if it is excessive and the failure is due to reasonable cause and not willful neglect.

### **Penalties That Apply If These Filing and Excise Tax Requirements Are Not Satisfied**

A failure to satisfy these filing and excise tax requirements could result in late penalties of up to 50 percent, and interest charges.

### **Effective Date of These New Filing and Excise Tax Requirements**

These new filing and excise tax requirements apply to any Form 8928 that is due on or after January 1, 2010.

If you have any questions about this memorandum, please contact Ted Lewkowicz in our Syracuse office (315-218-8131, [tlewkowicz@bsk.com](mailto:tlewkowicz@bsk.com)) or any of the other members of our Employee Benefits and Executive Compensation Practice Group listed below.

In Central New York, call 315-218-8000 or e-mail:

Susan L. Dahline	<a href="mailto:sdahline@bsk.com">sdahline@bsk.com</a>
Stephen C. Daley	<a href="mailto:sdaley@bsk.com">sdaley@bsk.com</a>
Brian K. Haynes	<a href="mailto:bhaynes@bsk.com">bhaynes@bsk.com</a>
Richard D. Hole	<a href="mailto:rhole@bsk.com">rhole@bsk.com</a>
Aaron M. Pierce	<a href="mailto:apierce@bsk.com">apierce@bsk.com</a>

In Buffalo / Niagara Falls call 716-566-2800 or e-mail:

Darcie A. Falsioni	<a href="mailto:dfalsioni@bsk.com">dfalsioni@bsk.com</a>
John C. Godsoe	<a href="mailto:jgodsoe@bsk.com">jgodsoe@bsk.com</a>

In the Capital District, call 518-533-3000 or e-mail:

Amelia M. Klein	<a href="mailto:aklein@bsk.com">aklein@bsk.com</a>
-----------------	--

On Long Island, call 516-267-6300 or e-mail:

Terry O'Neil	<a href="mailto:toneil@bsk.com">toneil@bsk.com</a>
--------------	--

In New York City, call 646-253-2300 or e-mail:

Michael P. Collins	<a href="mailto:mcollins@bsk.com">mcollins@bsk.com</a>
--------------------	--

In the Rochester Region, call 585-362-4700 or e-mail:

Robert H. Kirchner	<a href="mailto:rkirchner@bsk.com">rkirchner@bsk.com</a>
--------------------	--