

HEALTH REFORM IMPACT

What you need to know NOW

NEWS FOR THE CLIENTS AND FRIENDS OF BASS, BERRY & SIMS PLC

Healthcare Reform Expands Nondiscrimination Rules To Fully-Insured Health Plans

July 12, 2010

Effective for plan years beginning on or after September 23, 2010, the nondiscrimination rules of Section 105(h) of the Internal Revenue Code that currently are limited to self-insured health plans will apply for the first time to fully-insured health plans. The only exception is that a "grandfathered" fully-insured plan will not be subject to these nondiscrimination rules.¹ One key distinction regarding the application of Section 105(h) to a fully-insured plan is how penalties are assessed. For instance, if a self-insured plan is determined to be discriminatory, the highly compensated individuals who receive the discriminatory benefits are subject to adverse tax consequences. However, under the newly expanded nondiscrimination rules, if a fully-insured plan is determined to be discriminatory, the highly compensated individuals will not be taxed. Instead the employer will be subject to a \$100 per day per participant excise tax, capped at the lesser of \$500,000 or 10% of the employer's healthcare expenses for the previous year. Other than this key difference in the penalties, the nondiscrimination rules are the same for both self-insured and fully-insured plans.

The Section 105(h) nondiscrimination rules prohibit a plan from discriminating in favor of highly compensated individuals with respect to eligibility or benefits. The definition of highly compensated individuals for this purpose generally includes greater than 10% shareholders, the five highest paid officers and the highest paid 25% of employees.

Most broad-based, fully-insured plans probably already comply with the Section 105(h) nondiscrimination rules or can be brought into compliance with relatively minor changes in coverage and benefit structure. However, the expanded nondiscrimination rules may be problematic for fully-insured supplemental plans that employers currently now provide to active and separated executive employees under employment and severance agreements.

If you have any questions regarding the information in this alert, or with respect to other provisions of the health reform legislation as it relates to your employee benefit plans, please contact any of the attorneys in our Employee Benefits Practice Group listed below.

Also, please [click here](#) to visit our special Web page for Health Reform IMPACT.

¹ See previous *Health Reform IMPACT* Alerts on what "grandfathering" means for a plan and how "grandfathered" status may be lost by [clicking here](#) and [here](#).

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