

To: Clients and Friends
From: Smith & Downey
Date: June 27, 2011
Re: IRS Reporting Required for Health Plan Administration Errors

As we work through tax return filing season for employer tax years beginning in 2010, renewed attention is being brought to the IRS's 2009 regulations requiring the reporting by employers, on Form 8928, of various health plan administration errors. Those regulations also require remitting the applicable penalty tax amount along with the Form 8928.

The following are subject to Form 8928 reporting and penalty taxes:

1. COBRA administration errors. (Special rules are provided concerning how to report multiple COBRA notice and other operational failures occurring in a single year.)
2. Failures to provide required pediatric vaccine coverage.
3. Failures relating to the following HIPAA requirements: limits on pre-exes (and related notices), certificates of coverage, special enrollment rights (and related notices), and nondiscrimination based on health status.
4. Failures relating to minimum hospital stays for mothers and newborns under the Mothers and Newborns Health Protection Act.
5. Failures relating to required benefits under the mental/nervous/substance abuse parity rules.
6. Failures under the HSA comparability rules.
7. GINA violations.
8. Michelle's Law violations.

The instructions to the Form 8928 generally place the filing obligation (and the related penalty tax payment obligation) on the employer, even in cases in which the error was committed by a service provider to the employer.

A required Form 8928 not filed by the employer's tax return deadline (ignoring extensions) incurs a late filing penalty of 5% of the unpaid penalty tax for each month (or part of a month) the return is late, up to a maximum of 25%. If a required penalty tax is paid late, there is a penalty of ½ of 1% of the unpaid tax for each month (or part of a month) that the tax is not paid, up to a maximum of 25%.

No de minimis or "good faith" exceptions are provided for the filing obligation, so this would seem to be a very "easy pickings" area in which the IRS could raise significant revenues. Therefore, employers should be extremely vigilant in their compliance efforts with respect to the

rules listed above -- coordinating their compliance efforts with their applicable service providers -- and they should consult with counsel if they discover errors that might require Form 8928 reporting and the payment of taxes and penalties.

Please let us know if you have any questions or if we can be of any assistance in your compliance efforts.