



Plan Sponsors Wise to Keep an Eye on Health Plan Non-Discrimination Rules

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Recently, we have received questions from several employers concerned about discriminatory health care benefits. Plan sponsors know that the Patient Protection and Affordable Health Care Act (PPACA) expanded health plan non-discrimination requirements, but they are not sure what the new requirements are, or how concerned they should be about them. There is good reason for this confusion because, although it's been three-and-a-half years since the passage of PPACA, we are still waiting on guidance to fully explain these non-discrimination rules.

There are a few things that we know for sure: PPACA extends non-discrimination rules similar to those in Code Section 105(h) to non-grandfathered, fully-insured health plans. While Code Section 105(h) (which prohibits self-insured group health plans from discriminating in favor of highly compensated employees) simply strips highly compensated employees of the tax-favored treatment derived from their receipt of discriminatory benefits, the new PPACA non-discrimination rule will carry with it much stiffer penalties. Under the PPACA rule, a plan sponsor may be subject to an excise tax of \$100 per day for each non-highly compensated employee who is not eligible for the discriminatory benefit, up to a maximum penalty of \$500,000.

The good news is that plans are not required to comply with these non-discrimination rules until further guidance is issued. Nonetheless, it's wise for plan sponsors to provide non-discriminatory benefits now, in preparation for the eventual enforcement of the law. The cleanest way to avoid running afoul of these non-discrimination rules is to provide any potentially-discriminatory benefits on an after-tax basis. For example, in lieu of providing enhanced benefits under the company's group health plan, an employer could issue a bonus to a highly compensated employee that he may use toward his health care premiums or to purchase additional benefits. If your company already provides potentially discriminatory benefits, we recommend clearly reserving the right to stop providing these benefits on a tax-favored basis.

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Author

[Erin Haldorson Weber](#)

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Erin Haldorson Weber

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