



# No Question - IRS Slams the Door on Cost-Shifting Under the Affordable Care Act

Client Advisories

06.05.2014

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On May 13, 2014, the Internal Revenue Service (IRS) put to rest the strangely persistent idea that employers might choose under the Affordable Care Act (ACA) to shift the cost of health insurance to the government. Specifically, many employers have thought to terminate their group health insurance plans and instead send their employees to one of the new health insurance Marketplaces, armed with cash from the employer to cover the cost of premiums. The IRS has confirmed that doing so will result in noncompliance with the ACA and potentially devastating penalties.

Pursuant to a 1961 IRS Revenue Ruling, when an employer reimburses an employee for substantiated premiums for non-employer sponsored health insurance, the reimbursement amounts are not taxable to the employee. Such arrangements therefore are popular. However, in September 2013, the IRS released its Notice 2013-54. According to the Notice, an arrangement of the type described, now called an “employer payment plan,” is a group health plan. As such, the arrangement must comply with the ACA’s various market reform provisions, which include a general prohibition on annual limits on the dollar amount of benefits that may be provided to any individual. The Notice goes on to explain that the IRS will not consider an “employer payment plan” to be compliant with the ACA’s prohibition on annual limits.

Despite Notice 2013-54, the idea of employer cost-shifting via an arrangement of the type described above has persisted. On May 13, 2014, however, the IRS released a short “Q&A” guidance document, including the following question: “What are the consequences to the employer if the employer does not establish a health insurance plan for its own employees, but reimburses those employees for premiums they pay for health insurance (either through a qualified health plan in the Marketplace or outside the Marketplace)?” The answer, relying directly on Notice 2013-54, is that such arrangements are not compliant with the ACA. Going a step further than the Notice, though, the Q&A goes on to explain that such non-compliance may result in a \$100 per day (\$36,500 per year) excise tax, per employee.

This IRS position will have impacts on any employer, regardless of size. That is, this excise tax is separate and apart from the penalties that may be imposed on larger employers who fail to provide health insurance to their

employees. So, even employers with less than 50 employees will owe the excise tax, if they decide to replace their group health insurance by sending employees to the Marketplace exchanges and reimbursing them for the cost. The IRS position on this excise tax seems focused on one overriding goal -- preserving employer health plans.

As the above indicates, employers seeking to save costs on health insurance must explore means to do so other than via an employer payment plan. If your business requires assistance in exploring such other options, the firm's **Labor and Employment** and **Employee Benefit Plans** groups are available to help.

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