

Employee Classifications, Employer Shared Responsibility Tax and Medicare Collide

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Some employers have attempted to manage their risks related to the employer shared responsibility tax (a/k/a the pay or play penalty) by placing employees into classifications and indicating that particular classifications of workers are not to work more than 29 hours per week. (Employers should be aware that a couple of claims under ERISA 510 have been filed against employers changing work hours in response to the pay or play penalty.) This is one strategy that might work in theory until the business has a pressing staffing need and sometimes those policies have exceptions develop. An employee who was covered by Medicare wrote to the IRS about his employer's classification system and received a response that was released this summer in information letter 2016-0030. In this letter, the IRS restated its position that the employer shared responsibility tax is assessed based on the facts and circumstances of how many hours the employees work in a particular month, and that the employer's policies or classifications provide no protection from the tax assessment. The letter then went on to instruct that the fact the employee was in fact eligible for and receiving Medicare did not change whether the employer might be subject to the employer shared responsibility tax for this individual if he or she worked 30 or more hours per week.

While employers continue to develop strategies to manage tax liabilities, it is important as those policies are developed considering the other laws related to health plans. On September 6, 2016, we received the new levels of civil monetary penalties that can be assessed for violations of Medicare, including the Medicare Secondary Payer statutes and regulations. The penalty per incident of an employer offering any financial or other incentive for an individual entitled to Medicare benefits to not enroll in the employer's employee group health plan when that plan would be the primary payer has now moved from the original amount of \$5,000 per person to \$8,908 per person. Policies for eligibility to enroll in the group health plan need to be carefully drafted to not violate the prohibition on providing incentives to not enroll in the group health plan by those who are Medicare eligible.

If a plan or employer knowingly, wilfully and repeatedly fails to complete a claim form relating to the availability of other health benefits as required or provides inaccurate information related to a claim, the penalty has increased from \$2,000 per occurrence to \$3,182 per occurrence.

If a third party administrator, insurer or a fiduciary for a group health plan fails to provide information to CMS that identifies situations where the group health plan is or was a primary plan to Medicare (e.g., the employer fails to respond to the request from CMS within 30 days of receipt of the request), the penalty has also risen from \$1,000 per person to \$1,138 per person. Periodic review of agreements with vendors regarding who is responsible for responding to Medicare Secondary Payer requests and what procedures are in place is prudent to avoid the substantial penalties for failure to respond timely to a request for information.

Plan sponsors may want to review their procedures and compliance steps not only for the employer shared responsibility tax, but also for compliance with Medicare secondary payer requirements and for handling requests from CMS related to claims potentially subject to Medicare secondary payer requirements and for TriCare secondary payer requests which generally follow the Medicare Secondary payer laws. Thank you for taking the time to read this.

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