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# Guidance Issued

## Employer Reimbursement of Individual Policies

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Previously, the Departments of Labor (“DOL”), Health and Human Services (“HHS”) and the Treasury (collectively, the “Departments”) explained that HRAs and employer payment plans cannot reimburse individual policies. On November 6, the Departments issued their twenty-second set of FAQs which make clear that:

- An employer cannot offer employees cash to reimburse the purchase of an individual policy, without regard to whether the employer treats the money as pre-tax or post-tax to the employee. Such arrangements are subject to the market reform provisions of the Affordable Care Act (“ACA”), including prohibition on annual limits and the requirement to provide certain preventive services without cost sharing with which it cannot comply. Such an arrangement may be subject to a \$100/day excise tax per applicable employee (which is \$36,500 per year, per employee).
- An employer cannot offer employees with high claims risk a choice between enrollment in its standard group health plan or cash. This is impermissible discrimination based on a health factor under HIPAA, regardless of whether (1) the cash payment is treated by the employer as pre-tax or post-tax to the employee, (2) the employer is involved in the selection or purchase of any individual market product, or (3) the employee obtains any individual health insurance. Such an arrangement may be subject to a \$100/day excise tax per applicable employee (which is \$36,500 per year, per employee).
- A vendor that markets a product to employers claiming that employers can cancel their group policies, set up a Code Section 105 reimbursement plan that works with health insurance brokers or agents to help employees select

individual insurance policies, and allow eligible employees to access the premium tax credits for Marketplace coverage is not permissible. Such an arrangement fails to satisfy the market reforms and may be subject to a \$100/day excise tax per applicable employee (which is \$36,500 per year, per employee).

- First, the arrangements are themselves group health plans and, therefore, employees participating in such arrangements are ineligible for premium tax credits (or cost-sharing reductions) for Marketplace coverage. The mere fact that the employer does not get involved with an employee's individual selection or purchase of an individual health insurance policy does not prevent the arrangement from being a group health plan. DOL guidance indicates that the existence of a group health plan is based on many facts and circumstances, including the employer's involvement in the overall scheme and the absence of an unfettered right by the employee to receive the employer contributions in cash.
- Second, such arrangements are subject to the market reform provisions of the ACA, including prohibition on annual limits and the requirement to provide certain preventive services without cost sharing with which it cannot comply.
- Third, because the choice between taxable cash and a tax-favored qualified benefit (the election of coverage under the group health plan) is required to be under a cafeteria plan, imposing an effective additional cost to elect coverage under the group health plan could, depending on the facts and circumstances, also result in discrimination in favor of highly compensated employees in violation of the cafeteria plan nondiscrimination rules.

For the FAQs, visit: <http://www.dol.gov/ebsa/pdf/faq-aca22.pdf>.

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