

Cynthia Marcotte Stamer
Board Certified – Labor and
Employment Law
Texas Board of Legal Specialization
Direct Telephone: (972) 588.1860
Mobile Telephone: (469) 767.8872
Facsimile: (469) 814-8382

HELPING MANAGEMENT MANAGE

Primary Office
16633 Dallas Parkway, Suite 600
Addison, Texas 75001
Plano Office
3948 Legacy Drive
Suite 106, Box 397
Plano, Texas 75023
cstamer@solutionslawyer.net

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IRS, HHS & DOL To Delay Enforcement of New Insured Group Health Plan Non-Discrimination Rules Pending Guidance; Seek Public Input on Rules

The Internal Revenue Service (IRS), Department of Labor (DOL) and Department of Health & Human Services (HHS) recently announced that the agencies do not plan to enforce new rules that prohibit non-grandfathered insured group health plans from discriminating in favor of highly compensated employees until guidance is published on the workings of certain key elements of these requirements. The IRS announced the relief from enforcement of the new insured group health plan nondiscrimination requirements enacted as part of the Patient Protection and Affordable Care Act (Affordable Care Act) in Notice 2011-1, which was published in the Internal Revenue Bulletin on January 7, 2011. According to Notice 2011-1, the Agencies determined that questions about the construction of certain aspects of the non-discrimination rules made it inappropriate to require insured group health plans to comply or to impose sanctions for their failure to comply with the new non-discrimination rules until the agencies publish certain regulations or other administrative guidance. According to Notice 2011-1, pending the publication of further guidance, the agencies do not intend to enforce sanctions for non-compliance with the new non-discrimination rules and will not require insured group health plan sponsors to file IRS Form 8928 with respect to excise taxes resulting from the incorporation of Public Health Services Act (PHS Act) § 2716 into Internal Revenue Code (Code) § 9815.

New Insured Plan Non-Discrimination Rules

As part of the Affordable Care Act health care reforms, Congress amended the PHS, Code and the Employee Retirement Income Security Act (ERISA) to require insured non-grandfathered group health plans to satisfy non-discrimination rules like those applicable to self-insured group health plans under Code § 105(h). Unlike the taxation of highly compensated participants that generally results from a discriminatory self-insured group health plan, however, the Affordable Care Act provides for potentially draconian sanctions against an insured group health plan or its sponsor when an insured group health plan violates these non-discrimination requirements.

The Affordable Care Act generally provides that if a non-grandfathered insured employer-sponsored group health plan that discriminates in favor of highly compensated employees in a manner that would violate the non-discrimination requirements of Code § 105(h)(2) in any post-September 22, 2010 plan year, the plan or plan sponsor may face significant excise taxes, civil money penalties, and lawsuits to compel it to provide nondiscriminatory benefits to non-highly compensated participants equivalent to the discriminatory benefits provided to highly compensated participants.

According to Notice 2011-1, the agencies determined from initial public comments that without regulations or other administrative guidance under PSA § 2716, plan sponsors are uncertain how to apply the nondiscrimination provisions. Accordingly, Notice 2011-1 indicates that the agencies decided that their enforcement of the new insured group health plan nondiscrimination rules should be delayed until the publication of that guidance. Notice 2011-1 invites concerned plan sponsors and others to submit comments on a broad range of concerns relating to this guidance. According to Notice 2011-1, the deadline for submission of this input is March 11, 2011.

Implications of Relief For Insured Group Health Plans

While Notice 2011-1 indicates that HHS and DOL also plan to hold off enforcement of the new non-discrimination rules, it is unclear what effect, if any, the relief announced in the Notice will have on the ability of participants and beneficiaries to enforce the requirements by filing civil lawsuits under ERISA. Under ERISA § 512, participants and beneficiaries generally have the ability to sue plans and their fiduciaries for equitable relief to enforce violations of ERISA. As amended by the Affordable Care Act, the new non-discrimination requirements for insured group health plans of ERISA § 715(a)(1) are effective for all post-September 22, 2010 plan years. Accordingly, while insured group health plans and their sponsors still potentially risk participant or beneficiary law suits if their program is discriminatory.

While awaiting further guidance from the agencies, insured and self-insured group health plans, their sponsors and fiduciaries should document their attempt to prudently evaluate and determine their responsibilities under the non-discrimination rules, and other federal laws. In addition, plans, their fiduciaries, sponsors and service providers should begin implementing and administering the data collection and other processes that they are likely to need to test their programs for discrimination and perform other requirements. To encourage the agencies to adopt regulations that are sensitive to the challenges of plan sponsors and plans in meeting these requirements, plan sponsors, fiduciaries, insurers and service providers also should provide input to the agencies and Congressional health care policy leaders about these concerns.

For More Information Or Assistance

If you need assistance in responding to these new rules or auditing or assessing, updating or defending other labor and employment, employee benefit or compensation practices, please contact the author of this update, attorney Cynthia Marcotte Stamer [here](#) or at (469)767-8872.

Board Certified in Labor & Employment Law by the Texas Board of Legal Specialization, management attorney and consultant Ms. Stamer is nationally and internationally recognized for more than 23 years of work helping employers; employee benefit plans and their sponsors, administrators, fiduciaries; employee leasing, recruiting, staffing and other professional employment organizations; and others design, administer and defend innovative workforce, compensation, employee benefit and management policies and practices. The Chair of the American Bar Association (ABA) RPTE Employee Benefits & Other Compensation Committee, a Council Representative on the ABA Joint Committee on Employee Benefits, Government Affairs Committee Legislative Chair for the Dallas Human Resources Management Association, and past Chair of the ABA Health Law Section Managed Care & Insurance Interest Group, Ms. Stamer works, publishes and speaks extensively on wage and hour, worker classification and other human resources and workforce, employee benefits, compensation, internal controls and related matters. She also is recognized for her publications, industry leadership, workshops and presentations on these and other human resources concerns and regularly speaks and conducts training on these matters. Her insights on these and other matters appear in the Bureau of National Affairs, Spencer Publications, the Wall Street Journal, the Dallas Business Journal, the Houston Business Journal, and many other national and local publications. For additional information about Ms. Stamer and her experience or to access other publications by Ms. Stamer see [here](#) or contact Ms. Stamer directly.

Other Helpful Resources & Information

If you found this article of interest, you also may be interested in reviewing other Breaking News, articles and other resources available [here](#) including:

- [Attorney Cynthia Stamer Shares Best Practices for Protecting Plan Participant & Other Employee Information At SBWA/IRS Plan Administrator Skills Workshops](#)
- [Supreme Court Medical Resident Stipend Ruling Highlights Advisability of Worker Classification & Payroll Practice Review Advisable For Health Care, Other Employers](#)
- [IRS Expands When HFSAs & HRAS May Allow Over-The-Counter Drug Purchases With Drug Cards](#)
- [Holiday Season Celebration Reminder To Manage Intoxication Risks](#)
- [Avoiding Post-Holiday Season HR Liability Hangover](#)
- [2011 Standard Mileage Rates Announced](#)
- [Proposed New DOL Defined Benefit Plan Annual Funding Notice Rule](#)
- [Affordable Care Act Grandfathered Plan Rules Loosened To Allow Insured Plans Making Some Insurance Changes To Qualify](#)
- [Managed Care Executive Quotes Stamer On Implications Of Affordable Care Act Claims & Appeals Rules](#)
- [DOL Proposes To Expand Investment Related Services Giving Rise to ERISA](#)
- [EEOC Charges Employers With Violating ADA By Denying Medical Leave](#)
- [Annual Benefit Limitation Waiver & Anticipated HHS Medical Loss Ratio Guidance Offer Quick Acting Employers, Insurers New Mini-Med, Health Plan Design Options](#)
- [New Insured Group Health Plan Non-Discrimination Rules Create Significant Liability For Employers & Insurers; Prompt IRS Also To Review Self-Insured Group Health Plan Rules](#)

- [Tighten & Update of Health & Other Plan Claims & Appeals Procedures & Documentation In Response To New Regulations, Tightening Court Review](#)
- [Small Employers Sponsoring Health Coverage May Qualify For New Tax Credit, Must Act Quickly To Comply With Other New Federal Health Plan Mandates](#)
- [Rite Aid Agrees to Pay \\$1 Million to Settle HIPAA Privacy Case As Office of Civil Rights Proposes Tighter HIPAA Privacy & Security Regulations](#)
- [New Affordable Care Act Mandated High Risk Pre-Existing Condition Insurance Pool Program Regulations Prohibit Plan Dumping of High Risk Members, Set Other Rules](#)
- [Review Of Worker Classifications Needed As Classification Scrutiny Rises](#)
- [Businesses Employing Children Should Review & Tighten Practices in Light of Tightened Rules & Increased Penalties](#)
- [Labor Department FMLA Guidance Adopts Broad Interpretation, Employer Care Needed Determining Who Qualifies As Child](#)
- [Agencies Release Regulations Implementing Affordable Care Act Health Plan Preventative Care Mandates](#)
- [Office of Civil Rights Proposes Changes To HIPAA Privacy, Security & Civil Sanctions Rules](#)

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