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Ken Berry, JD • May. 27, 2014

Employers can't get around the Obamacare "shared responsibility" provision simply by giving employees tax-free cash to pay for health insurance from a state-run exchange. In effect, this would pump up a worker's pay and dump them in the marketplace. According to a new question and answer (Q&A) posted on the IRS website, as initially reported by the New York Times on May 25, the agency authoritatively states that the scheme won't be allowed.

Under the shared responsibility provision in the Patient Protection and Affordable Care Act (PPACA), known informally as Obamacare, employers with 50 or more full-time employees (FTEs) are required to provide minimal essential health insurance coverage to eligible workers. Otherwise, the employer may be assessed a tax penalty of \$2,000 per month per employee.

At the beginning of this year, the effective date for this employment mandate was postponed for one year for the second time for mid-sized companies with 50 to 100 FTEs. The new deadline for these firms is January 1, 2015.

In a separate PPACA provision, an employer may be assessed an excise tax penalty of \$100 per day per employee – a staggering annual total of \$36,500 for just one worker – if it fails to comply with certain nondiscrimination standards. This provision applies to all employers, regardless of the number of FTEs they employ.

According to the website Q&A, employers can't circumvent the rules by providing

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reads as follows:

“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)?

Under IRS Notice 2013-54, such arrangements are described as employer payment plans. An employer payment plan, as the term is used in this notice, generally does not include an arrangement under which an employee may have an after-tax amount applied toward health coverage or take that amount in cash compensation. As explained in Notice 2013-54, these employer payment plans are considered to be group health plans subject to the market reforms, including the prohibition on annual limits for essential health benefits and the requirement to provide certain preventive care without cost sharing.

Notice 2013-54 clarifies that such arrangements cannot be integrated with individual policies to satisfy the market reforms. Consequently, 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) under section 4980D of the Internal Revenue Code.”

The IRS issued Notice 2013-54 back on September 13, 2013. It addresses various issues relating to health reimbursement arrangements (HRAs), flexible spending accounts (FSAs) for health care expenses and other employer healthcare plans.

In theory, an employer could still increase a worker's salary with the intention of having him or her acquire health insurance through the marketplace. But such an arrangement would result in extra taxable compensation to the employee – plus employment taxes owed by the employer — and could be challenged as a

discriminatory reduction in worker benefits. Furthermore, the employer would have

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