12 Ways to Avoid PPACA Fines

September, 2013

Benefits Pro

Should employers pay any attention to all of the theoretical penalties that are tied to the requirements of the Patient Protection and Affordable Care Act?

If you're feeling lucky, maybe not. But following the rules wouldn't be a bad idea.

As implementation of key parts of the PPACA approach, the U.S. Department of Labor is underscoring two themes:

1. Employers are required to comply with rules like notifying employees of options, but …
2. if they don't comply, it's really up to them to report the infraction themselves, because the DOL says it isn't going to enforce the rules.

Just last week, the DOL went on record saying that employers don't need to worry about being fined for failing to notify their workers of their health coverage options in writing by Oct. 1.

So, as an employer, why bother if there's no penalty?

Because fines might come from somewhere else aside from the DOL, says attorney Keith McMurdy, a partner with Fox Rothschild LLP in New York.

McMurdy has been wrestling with the comply-don't comply dilemma for a while. Now, he said, he is recommending that companies simply comply, because failure to do so could come back to bite you.

McMurdy told BenefitsPro.com that the byzantine sanctions process surrounding the act offer several agencies the option to go after non-compliant employers – if they so choose. Among those who might come after a non-compliant employer:

- The IRS.
- DOL's Wage and Hour Division, which administers the Fair Labor Standards Act, where the law's notification requirement can be found (section 18B).
- An employee or an employee's representative (i.e., a union or a labor lawyer) that might decide to file a lawsuit.

"Effectively, the DOL is saying, 'We won't penalize or fine you.' But they are wording their position very carefully. What they don't say is that someone else might decide to go ahead and enforce the sanctions," McMurdy said. "How much of a stretch would it be for an employee at a company with 2,000-3,000 employees to decide to file a class-action suit on behalf of all the workers because you didn't comply with the notification rule? Not only would you have to pay the fine, but all attorney fees as well."

McMurdy posted a blog recently addressing this very subject, shortly after the DOL had released, in Q&A format on its website, information indicating it would not penalize those who don't notify workers. Here's what he wrote:

"1. The (DOL) FAQ provided on 9/11 says "(i)f your company is covered by the Fair Labor Standards Act, it should provide a written notice to its employees about the Health Insurance Marketplace by October 1, 2013, but there is no fine or penalty under the law for failing to provide the notice."

1. Technical Release 2013-02, from the DOL, says that Section 18B of the FLSA generally provides that "an applicable employer must provide" each employee a notice.

2. Section 18B of the FLSA definitely says that any employer subject to the FLSA "shall provide" written notice to current and future employees.

"My experience with the federal laws and the enforcement of said laws by federal agencies is that when things say "shall" and "must," there are penalties when you don't do them. So when the DOL now takes the position that it is not a "shall" or "must" scenario, but rather only a "should" and "even if you don't we won't punish you" proposition, I get suspicious. But I also think this confirms what I have said since the beginning about PPACA compliance for employers. It is all about your risk-tolerance.

"Employers have to decide how much risk they are willing to take, either in the cost of complying, the potential penalties or the risks associated with managing their workforce to comply with eligibility requirements. In the face of uncertainty, employers have to decide how much money is worth saving now as compared to possible future costs of penalties or loss of employees."

It's not just the insurance options notification situation that McMurdy says puts employers at risk. He offered the following examples of potential penalty-triggering act violations where employers could face $100-a-day fines.

1. PPACA limits restrictions. Group health plans may not establish any annual or lifetime dollar limits on essential health benefits — those core health benefits that have been defined by the act as basic elements for any coverage plan.

2. Failure to offer coverage to dependents up to the age of 26. Children of parents with health coverage up to age 26 must be offered coverage.

3. Retroactive rescission of benefits. Health plans can't cancel or discontinue coverage retroactively unless premiums/contributions aren't paid for a certain period of time.

4. Failing to cover the preventative care services specified by the act. The law specifies certain preventative care services that all plans must cover without charging a co-pay or cost-sharing. While coverage of contraception tools has been the most controversial of these, it is but one of many listed by the PPACA. Others include various screenings, well-baby services and breast feeding support.

5. Failing to have a revised appeal process (including external appeals) so people can challenge a claim denial. Designed to support patients faced with rejected insurance claims by their providers, this regulation requires health plans to include an appeals process for denied claims.

6. Failing to provide timely notices. Insurance options isn't the only one, it's a long list. For instance, new employees must receive notification of their plan options, participants must receive notice that dependents up to age 26 are eligible for coverage and the list goes on and on.

7. Restrictions on emergency room visits. The act says patients don't need pre-authorization for ER visits, and any plan that requires such faces penalties.

8. Restrictions on designation of primary care physicians so employees know they can choose any primary care physician if their plan requires them to pick on. Plans may recommend primary care practitioners but employees have the right to choose whoever they want to.

9. Improper pre-existing condition exclusions. Of course, this was one of the matters at the heart of healthcare reform. No one can be denied affordable coverage due to a pre-existing medical condition. No exceptions.

10. Failing to follow new out-of-pocket costs as outlined in the act. The act has created a formula for calculating out-of-pocket expenses that caps them for each plan. Exceeding these limits triggers the penalty clause. Figuring out the limit will be the real test, however.

11. Violations of the 90-day waiting period limit for coverage under an employer-sponsored plan. Employers offering health coverage to employees cannot make employees wait longer than 90 days to be eligible for that coverage.

12. Nondiscrimination rules. These rules prohibit employers from offering current or former workers healthcare coverage levels that aren't available to all employees within the company. This is a sticky one, because top execs often get healthcare perks that grunts don't receive.

Return to Article Index

Forward this article to a colleague

Address To | Recipient Name

Subject

Message

Send Reset