NIXON BENEFITS

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■ **T**he Department of labor has clarified in a FAQ that no penalty will apply to an employer who fails to provide a Notice of Exchange to employees. This does not mean that noncompliance is a good idea. The lack of penalty does not translate into a lack of consequences. Plan sponsors still have a fiduciary obligation to be forthcoming with plan participants and beneficiaries. The Notice of Exchange could be viewed by the DOL as within the scope of the employer's required disclosures to participants and thus within the scope of an ERISA audit, or separate penalties could be imposed through an amendment to the FLSA or the ACA.

E is for ERISA 9/11/2013

■ COBRA's premium payment rules took center stage when the New Jersey Star-Ledger reported that a qualified beneficiary with leukemia had his coverage terminated early because his premium payment was 26 cents short. The story had a happy ending, but employers and their service providers can avoid being the villains of such reports by brushing up on COBRA requirements.

The column described how Sergio Branco, who has leukemia, elected COBRA coverage after his termination of employment. His monthly premium was $518.26, but the first premium payment was made for $518 — 26 cents short. As a result, his coverage was cancelled. Sergio was scheduled to have a bone marrow transplant, so the Brancos contacted the DOL and got attorneys involved in order to get his coverage reinstated. Ultimately, the employer would retroactively reinstate Sergio's coverage, so the family said it would not pursue litigation and the transplant occurred as planned.

The situation described in the Star-Ledger is a reminder of an important, and controversial, COBRA premium rule. The IRS' final COBRA regulations establish special rules for COBRA premium payments that are short by an amount that is "not

significant." In such cases, a plan must choose between one of two options: 1. treat the payment as satisfying the plan's payment requirement as payment in full for COBRA coverage; or 2. notify the qualified beneficiary of the deficiency amount and grant him or her a reasonable period (as a safe harbor, 30 days is deemed reasonable) to pay the shortfall.

The IRS regulations state the term "not significant" means the shortfall is not greater than the lesser of $50, or 10 percent of the amount to be paid.

Thompson Smart HR Manager 8/27/2013

■ While a lot of employers are focused on the penalties associated with not offering appropriate coverage (the $2,000 penalty) or not offering affordable coverage (the $3,000 penalty), what gets overlooked is the myriad of "daily" penalties that come with non-compliance. PPACA has a $100 a day general "non-compliance" penalty. This general penalty requires employers to correct compliance failures within 30 days of discovery or self-report a $100 a day penalty for failing to comply on IRS Form 8928 for each day the employer failed to comply with a PPACA mandate. So failing to provide notices can get expensive. Some $100/day penalties:

1. Violating the non-discrimination rules (not yet written)
2. Violating the limits restrictions
3. Failing to extend coverage to dependents to age 26
4. Having retroactive rescission of benefits
5. Failing to cover preventive care
6. Failing to have a revised appeal process
7. Failing to provide timely notices
8. Violating the restrictions on emergency room visits
9. Violating restrictions on designation of primary care physicians
10. Improper pre-existing condition exclusions
11. Having excessive out-of-pocket costs
12. Violations of the 90-day waiting period limit

Employers who simply assume that an insured plan complies with these requirements, could find themselves in a sticky (and costly) situation if an audit reveals they have failed to comply. This is particularly the case now that they are required to self-report penalties. Both the IRS and the DOL could be involved, causing serious headaches.

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