

## Health Care Reform Compliance Failure Penalties

The Patient Protection and Affordable Care Act, as amended (PPACA) effectuates its insurance market reforms and other mandates via amendments to the Public Health Service Act (PHSA), the Internal Revenue Code (the Code), and the Employee Retirement Income Security Act (ERISA).

Many of PPACA's mandates are made in the form of amendments to the PHSA, which applies directly to insurers and governmental plans. However, PPACA makes these provisions applicable to employer-sponsored health plans (including self-insured plans) through ERISA § 715 (which adds the new PHSA provisions to ERISA) and Code § 9815 (which adds the new PHSA provisions to the Code).

### **Penalties for Failure to Comply with PHSA Mandates**

<b>Requirement</b>	<b>Penalty</b>
<p>Provision of minimum essential coverage to full-time employees through a group health plan by employers with 50 or more employees.</p> <p>PPACA § 1513; Code § 4980H</p>	<p>If the employer does not provide coverage and at least one full-time employee receives coverage through an Exchange, the employer is penalized \$2,000/yr for each full-time employee.</p> <p>If the employer provides unaffordable coverage, the employer must pay lesser of: \$3,000/year for each full-time employee receiving the premium credit or \$2,000/year for each full-time employee.</p> <p>For purposes of calculating the \$2,000/employee penalty, the first 30 employees are disregarded.</p> <p>Note: This penalty applies to employer sponsors of private sector group health plans through Code § 4980H.</p>
<p>Uniform explanation of coverage (summary of benefits and coverage) and 60-day notice of material modifications made other than in connection with a plan's renewal.</p> <p>PHSA § 2715; PPACA § 1001</p>	<p>\$1,000 fine for each willful failure to comply.</p>
<p>Individual Mandate</p> <p>PPACA § 1501(b), Code § 5000A(c)</p>	<p>The applicable penalty is the greater of the flat dollar penalty or the gross income penalty.</p> <p>The flat dollar penalty in 2014 is \$95.00 per individual to a maximum of \$285 per family. The penalty in 2015 is \$325 per individual to a maximum of \$975 per family. The penalty in 2016 is \$695 per individual to a maximum of \$2,085 per family. The flat dollar penalty is halved for dependents under 18.</p>

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	The gross income penalty in 2014 is 1% of household income in excess of a specified filing threshold, 2% in 2015 and 2 ½% in 2016 and beyond. Waivers are allowed for specified individuals and circumstances. The gross income penalty is capped at the national average premium of a bronze level Exchange plan.
Nondiscrimination Rules PHSA § 2716; PPACA §§ 1001, 10101	\$100/day for each responsible entity, for each individual affected by the violation.
Restricted Annual Limits (until 2014), No Lifetime Limits or Annual Limits (beginning 2014) PHSA § 2711; PPACA § 1001	\$100/day for each responsible entity, for each individual affected by the violation.
Group Health Plan Coverage must Extend Eligibility for Dependents to Age 26 PHSA § 2714; PPACA § 1001	\$100/day for each responsible entity, for each individual affected by the violation.
No Retroactive Rescissions of Coverage after Enrollment PHSA § 2712; PPACA § 1001	\$100/day for each responsible entity, for each individual affected by the violation.
First Dollar Coverage for Preventive Care PHSA § 2713; PPACA § 1001	\$100/day for each responsible entity, for each individual affected by the violation.
Revised Appeals Process, PHSA § 2719; PPACA § 1001	\$100/day for each responsible entity, for each individual affected by the violation.
Disclosure in all Plan Materials Providing Notice of Grandfathered Status for Health Plan PPACA § 1251	\$100/day for each responsible entity, for each individual affected by the violation.
Disclosure of Plan Information to HHS PHSA § 2715A; PPACA § 1311(e)	\$100/day for each responsible entity, for each individual affected by the violation.
Prohibition on Emergency Room Restrictions PHSA § 2719A; PPACA § 1001	\$100/day for each responsible entity, for each individual affected by the violation.
Prohibition on PCP Restrictions PHSA § 2719A; PPACA § 10101	\$100/day for each responsible entity, for each individual affected by the violation.
No Pre-Existing Condition Exclusions for	\$100/day for each responsible entity, for each

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Participants Under 19; No Pre-Existing Condition Exclusions (beginning 2014)  PHSA § 2704; PPACA §§ 1255, 10301	individual affected by the violation.
Limit on Employee Out-of-Pocket Expenses  PHSA § 1302, PPACA § 1101	\$100/day for each responsible entity, for each individual affected by the violation.
Identification by Employers that Self-Insure of those Offered Group Health Coverage and Dates of Coverage; Certification by Employers of 50 or More Full-Time Employees of Whether all Full-Time Employees and Dependents were Offered Group Health Care Coverage  PPACA § 1514	\$100/day for each responsible entity, for each individual affected by the violation.
Required Coverage for Clinical Trials for Life-Threatening Diseases  PHSA § 2709	\$100/day for each responsible entity, for each individual affected by the violation.
90-Day Limit on Waiting Periods  PHSA § 2708; PPACA § 1201	\$100/day for each responsible entity, for each individual affected by the violation.
Increase in Wellness Program Incentives from 20% of the Total Cost of Coverage to 30% (50% for tobacco cessation programs)  PHSA § 2717; PPACA § 1001	\$100/day for each responsible entity, for each individual affected by the violation.
Community Rating Restrictions Regarding Premium Variations for Health Insurers Providing Individual or Small Group Policies and Insurers Offering Large Group Policies using an Exchange  PPACA § 1334	\$100/day for each responsible entity, for each individual affected by the violation.
Automatic Enrollment  PPACA § 1511, Fair Labor Standards Act § 18A	\$100/day for each responsible entity, for each individual affected by the violation.

## **Penalties for Failure to Comply with Code § 9815**

Failure to comply with a PHSA mandate will potentially trigger an excise tax of \$100 per day under the Code “with respect to each individual to whom such failure relates.” The tax could apply to private-sector group health plans, insurers of group health plans, and church plans, but not to state and local government group health plans.

The minimum excise tax for a compliance failure discovered after a notice of examination generally is \$2,500. The minimum excise tax is increased to \$15,000 if violations are “more than de minimis.” The maximum excise tax for “unintentional failures” for a single employer plan is the lesser of 10% of the amount paid during the preceding tax year by the employer for group health plans, or \$500,000.

For single employer plans, the tax is imposed on the plan sponsor. For multiemployer plans, the tax is imposed on the plan.

### **Exceptions:**

- Does not apply to small employers (fewer than 50 employees) that provide health coverage solely by means of a fully insured plan through a contract with a health insurance issuer if the failure is solely caused by the health insurance coverage offered by the insurer.
- If the entity otherwise liable for the tax can demonstrate that it did not know (and, in exercising reasonable diligence, would not have known) that there was a compliance failure.
- The tax may not apply if the entity can demonstrate that the failure was due to reasonable cause rather than willful neglect and was corrected within 30 days after the responsible entity first knew (or, in exercising reasonable diligence, should have known) that the failure existed.

## **Penalties for Failure to Comply with ERISA § 715**

Failure to comply with the PHSA mandates incorporated into ERISA risks enforcement action by the DOL (civil action or civil penalty for failure to provide documents to the DOL upon request) and participant lawsuits. These penalties could apply to private-sector group health plans and insurers of group health plans, but not state and local government group health plans or church plans.

The civil penalties are those permitted under ERISA § 502(c) (generally, \$110/day from the date of the failure, but in no event in excess of \$1,000 per request).