

# Health Plan Alert

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## Critical New Nondiscrimination Rules For Fully Insured Health Plans Are Delayed

### Summary

Scheduled for January 1, 2011 for most employers, health care reform was going to apply nondiscrimination rules to fully insured health plans. These new rules would have materially changed the way many health plans are designed. Similar rules already apply to self-funded health and medical plans. The Internal Revenue Service just delayed the January 1, 2011 effective date to a later date.<sup>1</sup>

### Discussion

Traditionally, fully insured health plans were not subject to Internal Revenue Code (“Code”) nondiscrimination rules. This meant that employers could, for example, design plans that provide different benefits or eligibility criteria for different classes of employees. Conversely, self-funded plans have long been subject to nondiscrimination rules under Code Section 105(h) (although, truth be told, Section 105(h) was not known by all employers). Our October *ERISA Health Plan News* provides helpful background information (we reprint it below for ease of reference).

With the January 1, 2011 compliance date looming for fully insured, nongrandfathered health plans, the Internal Revenue Service, at the eleventh hour, issued Notice 2011-1. This Notice delays the deadline for compliance with the Section 105(h) nondiscrimination rules and the related severe sanctions for noncompliance. The deadline for compliance likely will not be until the beginning of the plan year following the issuance of additional guidance by the appropriate agencies.<sup>2</sup>

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*The delay in the compliance deadline for fully insured plans does not change the inevitability of these new rules (absent Congressional action)*

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<sup>1</sup> See IRS Notice 2011-1. A copy of Notice 2011-1 can be found at [www.erisalawgroup.com](http://www.erisalawgroup.com) under “Firm Publications.”

<sup>2</sup> On September 20, 2010, the Internal Revenue Service issued Notice 2010-63 requesting public comments on guidance needed regarding the new nondiscrimination rules. The comments received raised fundamental concerns about plan sponsors’ ability to comply with the requirements without further regulatory guidance. Notice 2011-1 confirms this guidance will be forthcoming.

## Critical New Nondiscrimination Rules For Fully Insured Health Plans - Continued

This delay in the compliance deadline for fully insured health plans does not, however, change the inevitability of the application of these new rules in the future. While the details of these rules remain to be developed, the concepts and principles of Code Section 105(h) should encourage employers to consider the potential required future changes to their fully insured and self-funded health plans. We expect the same conceptual principles that apply in the qualified plan nondiscrimination arena will apply to fully insured health plans. Employers' understanding of these principles and the bare bones of the statute will better position employers and employees for the new legal landscape.

The continued application of the Code Section 105(h) nondiscrimination rules to self-funded plans has not been lifted or affected.

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*Self-funded plans, grandfathered or not, still must comply with Code Section 105(h)*

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Notice 2011-1 requests public comments regarding thirteen specific issues that may be addressed in future guidance. The issues raise questions that have been a point of conversation; for example, must different rates of employer and employee contributions toward the cost of coverage, or different eligibility periods for different classes of employees, be nondiscriminatory. The enforcing agencies will likely address these issues in the next round of guidance.

Please call Jeffery Mandell at (208) 342-5522 or 1-866-ERISALAW if you would like to begin to prepare for the expected application of considerable health plan changes (in addition to the more apparent and publicized health care reform developments).

*The foregoing is intended to provide general information only and does not provide legal advice. The application of ERISA laws can be complex. For information regarding the impact of these developments under your particular facts and circumstances, please call us.*

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THE ERISA LAW GROUP, P.A.

# ERISA Health Plan News

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## New Health Care Reform Nondiscrimination Rules Will Affect All Employers

Complex, largely mathematical nondiscrimination requirements have long dictated the design of "qualified" retirement plans (such as 401(k) plans, defined benefit plans, etc.). These nondiscrimination rules are aimed to ensure that rank-and-file employees sufficiently receive benefits under the plan. Otherwise, the employer and employees may not obtain the plan's unique favorable tax benefits. Health plans historically have largely escaped nondiscrimination rules. With the new health care reform requirements, this is about to change.

### Background

Internal Revenue Code Section 105(h) has for decades imposed nondiscrimination rules on self-funded health plans (including cafeteria plans). If a self-funded health plan, also known as a self-insured plan, did not meet the Section 105(h) requirements, certain key employees in the plan would be taxed on all or a portion of the plan's benefits. In the self-funded plan arena, the nondiscrimination rules commonly were ignored and/or not known by employers, and furthermore the Internal Revenue Service never seemed particularly active in enforcing these rules. In contrast, fully insured plans have never been subject to these requirements.

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*Nondiscrimination rules  
now apply to fully insured  
health plans*

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Under the new legislation, the nondiscrimination requirements under Section 105(h) not only continue to apply to self-funded plans, but now also apply to non-grandfathered fully insured plans. The new rules are effective with respect to plan years beginning six months after March 23, 2010. This means that for many plans the new rules are effective on January 1, 2011.

### New Consequences

The new rules will mean that some health plans as currently configured will trigger income tax consequences to an employer's key employees. We fully suspect that the Internal Revenue Service will have a heightened interest in enforcing the new rules, tagging key employees whose employers do not comply. As with all of the Internal Revenue Code's and ERISA's nondiscrimination rules, the "devil is in the details," and opportunities will exist to best position the employer and its key employees.

An employer that provides richer benefits, pays greater premiums, has more generous eligibility provisions, or makes other distinctions between employees, of any nature, will need to review the new rules to avoid unintended, unpleasant tax consequences for the employer and its key employees.

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