Can Small Employers Purchase DPC Coverage Without ACA Compliant Insurance?

The Employer Shared Responsibility Provision of the Affordable Care Act (ACA) penalizes employers who either do not offer coverage or do not offer coverage which meets minimum value and affordability standards. In 2016, penalties of up to $3,240 will apply to firms with 50 or more full-time equivalent employees. This overview by the Kaiser Family Foundation summarizes the "employer responsibility" provisions well.

There are, however, a complicated set of circumstances under which employers with *fewer* than 50 employees wishing to provide a direct primary care (DPC) arrangement for their employees may face penalties if they do not add ACA compliant insurance coverage for healthcare issues outside of primary care.

Ideally DPC plans should be accompanied by an insurance plan meeting the ACA's "minimum value" standards to avoid potentially significant fines.

If an employer provides a DPC arrangement that is not accompanied by a qualified plan for its employees (regardless of whether it has 50 or less than 50 full time equivalent employees), then according to the IRS "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." However, an employer payment plan "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." The most likely scenario for a DPC practice is that an employer with less than 50 employees wants to sponsor DPC; the employer is not required to buy insurance for its employees under ACA, but does not want to be subject to a $100 per day fine per employee. It would appear that the safest way to structure this arrangement to avoid the fine is to make sure the employer paid the DPC fees with after tax dollars, and of course gave the employees the option to take cash rather than enroll in the DPC practice.

If the employer does provide a qualified plan, either through the purchase of a traditional plan or as a self-insured entity using a stop loss policy, then the employer may also purchase DPC for its employees without concern for the $100 daily fine. For more introductory information see this IRS discussion of Employer Health Care Arrangements.

Federal legislation, the Small Business Healthcare Relief Act has been proposed to remove this $100 per day fine and is under consideration by the House Committee on Ways and Means. This issue remains a top priority for small business owners but faces opposition from many Democrats in Congress. The National Federation of Independent Businesses offers a helpful overview.

The Internal Revenue Service has issued at least two notices regarding these issues: IRS Notice 2013-54 and IRS Notice 2015-17 (questions 4 and 5). As noted in Question #4 of Notice 2015-17, the safest and easiest way to avoid the $100 per day fine is to make the purchase of DPC a post-tax option. Employers (likely fewer than 50 employees) wishing to avoid the $100 per employee per day fine need ensure the DPC arrangement does NOT amount to a "Health Reimbursement Arrangement." The IRS says that a HRA is "an arrangement that is funded solely by an employer and that reimburses an employee for medical care expenses as defined under Code section 213(d)." As such, a potential defense might also be to structure the DPC arrangement such that each individual patient must pay part of the monthly fee so that the employer is not "solely" funding the arrangement. Potentially one could also argue that DPC is not a qualified medical care expense under section 213(d); however, since the IRS has yet to firmly decide whether DPC periodic fees are qualified expenses under 213(d), this could force an unfavorable guidance from IRS regarding the status of DPC as a qualified medical expense making it even harder for DPC to be compatible with HSAs.

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Disclaimer: This document is intended to provide an understanding of how current policy treats DPC and should not be deemed as tax advice. Those seeking such advice should seek independent tax counsel before making business decisions or passing on advice with regard to the tax status of any services or benefits.