



MARCH 1, 2025

Frost Insurance Benefits Compliance Tip

THE COST OF NON-COMPLIANCE

Is your health plan prepared for an investigation or audit? There are memorandums of understanding (MOUs) in place between the federal agencies of Health and Human Services (HHS), the Centers for Medicare & Medicaid Services (CMS), the Department of Labor Employee Benefits Security Administration (DOL/EBSA) and the Department of the Treasury Internal Revenue Service (IRS). Collectively, these agencies are ramping up enforcement efforts and are preparing to more closely evaluate employer sponsored health plan compliance.

Following are examples of penalties associated with failing to meet compliance with certain provisions of the Employee Retirement Income Security Act (ERISA), the Affordable Care Act (ACA) and other areas of law impacting employee benefits administration.

While this is not an all-inclusive list, one thing is for certain: the penalties can be very costly to businesses and will continue to increase. That’s why at Frost Insurance, benefits compliance is more than just a buzz word. We’ll walk you through the myriad of employer requirements, and help you get your group health plans in order.

| COMPLIANCE ITEM | ENFORCEMENT AGENCY | GENERAL PENALTY RISK |
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| 408(b)(2) Compensation Disclosure | DOL/ERISA | This triggers an automatic excise tax under the Internal Revenue Code of 15% annually until corrected. |
| CHIP notice | DOL/EBSA | Plan sponsor could be subject to penalty of up to \$145 per day for failure to provide CHIP Notice. |
| COBRA failures, including failure to distribute general COBRA notice and COBRA election notice | DOL/EBSA | Legal action may be brought by participants and an ERISA \$110 per day fine may be assessed. If a violation is discovered and is not corrected within 30 days of discovery, then the employer must self-report the violation on IRS Form 8928, and a civil penalty of \$100 per day would be assessed. The tax increases to \$200 per day if there is more than one qualified beneficiary affected in the same family to whom the failure relates. (Church plans are subject to different penalties and procedures for noncompliance, and governmental plans are exempt from the \$100 per day penalty.) There are overall limitations on penalty tax liability for failures during the taxable year “which are due to reasonable cause and not to willful neglect.” For single employer plans, the overall limit is \$500,000, or if less, 10% of the amount the employer paid or incurred during the preceding taxable year for group health plans. |
| ERISA plan documents | DOL/EBSA | Plan administrator could be subject to a penalty of up to \$171 per day. Willful ERISA violations can carry up to 10 years in prison and a \$100,000 fine. |
| Fidelity bond | DOL/EBSA | A plan’s fiduciaries can be held personally liable under ERISA’s general fiduciary duty rules for any loss to the plan that should have been but was not covered by a bond. Willful ERISA violations can also carry up to 10 years in prison and a \$100,000 fine. |

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| Form 1094/1095 violations | Treasury/IRS | For calendar year 2024 returns due between January 1, 2025 through December 31, 2025, the penalty for failure to file or incorrect filings, if corrected on or before 30 days is \$60 per Form. If corrected after 30 days but by August 1st, the penalty is \$130 per 1095 Form. If corrected after August 1st, the penalty is \$330 per form with a maximum of \$3,987,000. Note that the penalty is assessed per form, and employers must e-file Form 1095 with the IRS and furnish a copy to each full-time employee. Therefore, the penalty can be \$660 per form if it is neither e-filed nor provided to the employee. |
| Form 5500 violations | DOL/EBSA | The penalty for failure to file Form 5500 is \$2,739 per day. Willful violations can carry penalties up to 10 years in prison and a \$100,000 fine. |
| FMLA notice violations | DOL/Wage and Hour | Violations of the posting requirement of the FMLA is \$216 for each separate offense. Further, an employer may be liable for compensation and benefits lost by reason of the violation, for other actual monetary losses sustained as a direct result of the violation, and for appropriate equitable relief, including employment, reinstatement, promotion or any other relief. |
| Form W-2 reporting "aggregate cost" of employer sponsored coverage | Treasury/IRS | Failure to properly report the cost of coverage on Form W-2 may result in penalties of \$310 per Form W-2, up to a maximum of \$3,783,000. Corrections made within 30 days, or between 31 days but on or before August 1, the penalty may be reduced. |
| Gag Clause Prohibition Compliance Attestation (GCPA) | CMS | Due by December 31 of each year. Failure to submit attestation by this date may be subject to enforcement action (no specific penalty amount). |
| Genetic Information Nondiscrimination Act requirements (GINA) | DOL/EBSA, Treasury/IRS | Violations of the Genetic Information Nondiscrimination Act (GINA), such as establishing eligibility rules based on genetic information or requesting genetic information for underwriting purposes may result in penalties of \$145 per participant per day. If the failure is de minimis and not corrected prior to notice from the Secretary of Labor, the fine is \$3,642. If the failure is not de minimis, the fine is \$21,864. |
| HIPAA privacy policies and procedures noncompliance, including notice of privacy practices and breach notifications | HHS/OCR, DOL/EBSA, Treasury/IRS (HIPAA) | Civil penalties range from \$141 to \$71,162 per violation. Criminal violations may also apply, including a fine up to \$250,000 and imprisonment up to 10 years. The exact penalty will depend on whether the penalty is due to: lack of knowledge, reasonable cause without willful neglect, willful neglect corrected within 30 days and willful neglect not corrected within 30 days. |
| HIPAA security policies and procedures noncompliance | HHS/OCR, DOL/EBSA, Treasury/IRS (HIPAA) | Civil penalties range from \$141 to \$71,162 per violation. Criminal violations may also apply, including a fine up to \$250,000 and imprisonment up to 10 years. The exact penalty will depend on whether the penalty is due to: lack of knowledge, reasonable cause without willful neglect, willful neglect corrected within 30 days and willful neglect not corrected within 30 days. |
| IRS Letter 226-J notice | Treasury/IRS | For calendar year 2024, no offer of MEC is \$2,970 per full time employee; no affordable coverage is \$4,460 per full time employee. For calendar year 2025, no offer of MEC is \$2,900 per full time employee; no affordable coverage is \$4,350 per full time employee. |

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| IRS Notice 972CG | Treasury/IRS | Late filing or incorrect filing of information return documents may result in penalties of \$310 per document, up to a maximum of \$3,783,000. |
| Lifetime or annual limits imposed on the dollar value of essential health benefits beginning January 1, 2014 | DOL/EBSA, Treasury/IRS | If a violation is discovered and is not corrected within 30 days of discovery, then the employer must self-report the violation on IRS Form 8928, and a civil penalty of \$100 per day would be assessed. The tax increases to \$200 per day if there is more than one qualified beneficiary affected in the same family to whom the failure relates. (Church plans are subject to different penalties and procedures for noncompliance, and governmental plans are exempt from the \$100 per day penalty.) |
| Machine Readable files | IRS, DOL, CMS/HHS | Beginning July 1, 2022, CMS will enforce applicable price transparency requirements. For plans and issuers that are subject to CMS's enforcement authority and do not comply, we may take several enforcement actions, including: requiring corrective actions and/or imposing a civil money penalty up to \$100 per day, adjusted annually under 45 CFR part 102, for each violation and for each individual affected by the violation. |
| Medicare and TRICARE prohibition on providing financial incentives to encourage eligible employees not to enroll under group health plan, including "Taking into Account" age-based Medicare entitlement | CMS/HHS, Treasury/IRS | Civil penalty of up to \$11,524 as of August 8, 2024, for each violation. Under the Federal Claims Collection Act, the federal government is authorized to collect reasonable charges from third-party payer. Medicare also authorizes the federal government to collect the amount that Medicare paid incorrectly. If legal action is brought to collect, double damages may be assessed. The IRS may also impose an excise tax of 25% on employers with nonconforming plans. |
| Medicare Secondary Payer | CMS/HHS | Penalty of \$1,474 for any entity serving as an insurer, third party administrator or fiduciary for a group health plan that fails to provide information that identifies situations where the group health plan is or was a primary plan to Medicare to the HHS Secretary. |
| Mental Health Parity and Addiction Equity Act Non-Quantitative Treatment Limitation (MHPAEA NQTL) | DOL/EBSA | Fines may be up to \$100 per day for each individual affected by a parity violation. |
| Notice of material plan modification failures, Summary of Benefits Coverage (SBC) failures | DOL/EBSA (ACA) | A penalty of up to \$1,443 per failure. The fine cannot be paid from plan or trust assets. |
| Nondiscrimination testing failure under IRS Code §129 (Dependent Care Assistance Programs (DCAP) or Dependent Care Flexible Spending Arrangements) | Treasury/IRS | If a DCAP is discriminatory, then the benefits provided to the Highly Compensated Individuals (HCIs), will be included in their gross income. The non-HCIs, however, would not suffer any adverse consequences, and the plan itself would not lose its qualified status as a result of failing any or all of the above DCAP nondiscrimination tests. |

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| Nondiscrimination testing failure under IRS Code §125 (Cafeteria Plans) | Treasury/IRS | If a cafeteria plan fails any of the nondiscrimination tests, then the Highly Compensated Employees (HCEs) and/or "key" employees, as applicable, will lose the favorable tax treatment that the cafeteria plan otherwise provides. In other words, the tax-free treatment of benefits provided under the plan will be lost, and HCEs and key employees will have imputed income equal to the taxable benefit amount that they could have elected to receive for the plan year, even if they elected all qualified benefits. The employer would instead treat the amount as taxable income for purposes of Form W-2 wage reporting and for purposes of income tax, FICA and FUTA withholding. |
| Nondiscrimination testing failure under IRS Code §105(h) | Treasury/IRS | If a self-funded plan fails nondiscrimination tests, then the Highly Compensated Individuals (HCIs) are taxed on the full amount of their excess reimbursements. In other words, if a benefit is available only to an HCI and not to all other participants, then the total amount reimbursed to the HCI for that benefit is includable in gross income. If the benefit is available to non-HCIs but is a lesser benefit, then the amount available to the HCI will be offset by the amounts available to non-HCIs. |
| Out-of-pocket maximum limits violations | DOL/EBSA (ACA) | Although there is no specific penalty for noncompliance, the general ACA penalty would likely apply. If a violation is discovered and is not corrected within 30 days of discovery, then the employer must self-report the violation on IRS Form 8928, and a civil penalty of \$100 per day would be assessed. The tax increases to \$200 per day if there is more than one qualified beneficiary affected in the same family to whom the failure relates. (Church plans are subject to different penalties and procedures for noncompliance, and governmental plans are exempt from the \$100 per day penalty.) |
| Patient protections under the Affordable Care Act, including the preventive care mandate | DOL/EBSA and Treasury/IRS (ACA) | If a violation is discovered and is not corrected within 30 days of discovery, then the employer must self-report the violation on IRS Form 8928, and a civil penalty of \$100 per day would be assessed. The tax increases to \$200 per day if there is more than one qualified beneficiary affected in the same family to whom the failure relates. (Church plans are subject to different penalties and procedures for noncompliance, and governmental plans are exempt from the \$100 per day penalty.) |
| Patient Centered Outcomes Research Institute Fee (PCOR fee) | Treasury/IRS | The PCOR rules do not contain a specific penalty for failure to report or pay the PCOR fee. However, certain tax-related fees are accepted as applicable: 5% of the excise tax due for each month or part of a month the return is late, with a cap of 25% of the unpaid tax. 5% of the any tax not paid by the due date for each month or part of a month the tax remains unpaid, up to 25% of the unpaid tax. |
| Prescription Drug Reporting (RxDC) | CMS/HHS | ERISA Section 502(c)(2) penalties: For failures to file reports required by ERISA (which could include RxDC reports), the DOL may impose penalties of up to \$100 per day, per affected individual, for non-compliance. These penalties are subject to adjustments for inflation, which can increase the penalty amount. |

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| Section 125 cafeteria plan document | Treasury/IRS | Failure to adopt a plan document prior to the plan's effective date or failure to operate in compliance with the document/ corresponding regulations can result in disqualification of the plan's favorable tax status. Taxable income increases to all participants and the employer has increased employment tax liability. |
| Summary Plan Description (SPD) and Summary of Material Modifications (SMM) noncompliance | DOL/EBSA | Plan sponsor could be subject to a penalty of up to \$195 per day, not to exceed \$1,956 per request, if they do not provide within 30 days after an individual's written request. Willful violations can carry up to 10 years in prison, a \$100,000 fine for individuals and fines up to \$500,000 for companies. |

RESOURCES

HHS

Published August 8, 2024:

<https://www.govinfo.gov/content/pkg/FR-2024-08-08/pdf/2024-17466.pdf>

DOL

Published January 10, 2025:

<https://www.govinfo.gov/content/pkg/FR-2025-01-10/pdf/2024-31602.pdf>

IRS EXHIBIT 20.1.7-1

https://www.irs.gov/irm/part20/irm_20-001-007r#idm139761819517488

INSTRUCTIONS FOR FORM 8928

<http://www.irs.gov/pub/irs-pdf/i8928.pdf>

REV. PROC. 2024-14

Published February 12, 2024

<https://www.irs.gov/pub/irs-drop/rp-24-14.pdf>

DOL ENFORCEMENT MANUAL, CIVIL PENALTIES:

<https://www.dol.gov/agencies/ebsa/about-ebsa/our-activities/enforcement/oe-manual/civil-penalties>

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