Several aspects of the Executive Order's reporting requirements have the business community particularly concerned. At the same time the Obama Administration issued this new Executive Order creating a whole new pre-award process, it conceded that most contractors were responsible bidders. The existing procedures are adequate to weed out violators, far less burdensome on the contractor and the government, and use a well-established process with significant due process protections in place for contractors. The new procedures, in contrast, may well needlessly add uncertainty, subjectivity and onerous and costly new data collection and reporting requirements for federal contractors. Contractors are further concerned that the definition of violations does not clearly exclude agency "administrative" violations and therefore could include requiring disclosure of government actions that are not equivalent to a finding of liability.

Most troubling of all is that the Executive Order creates a process whereby the contracting agency can and must second guess resolutions and settlements entered into with respect to violations. The Labor Compliance Advisor in each agency, as indicated above, is given the authority and the obligation to go in and determine that further remedial programs are necessary both by the contractor *and* by its subcontractors, with pre-bid exclusion, contract loss and debarment as possible results. The Executive Order empowers the Labor Compliance Advisor to pursue suspension and debarment referrals for "appropriate" violations without providing any clear guidance to define such violations. The broad range of laws covered by the Executive Order, the many types of claims that these laws have been violated and the relationship of these claims to union organizing activity which typically triggers complaints to government agencies will put contractors in the position of having to settle baseless claims in order to avoid loss of government contracts. This is problematic for very large employers which very often do have multiple complaints and or litigation involving employment laws, but also a problem for small prime contractors and subcontractors. This Executive Order has dramatically raised the stakes and vastly diminished the ability of government contractor employers to contest claims they in good faith believe are without merit.

The Executive Order also takes aim at pre-dispute arbitration agreements used by government contractors. In 2010, Congress adopted a provision barring pre-dispute arbitration for certain DOD contractors with contracts of more than $1 million. Known as the Franken Amendment, it barred pre-dispute arbitration for claims arising under Title VII or any tort related to or arising out of sexual assault or harassment. Only arbitration agreed to after a claim had been made was to be permissible. This Executive Order extends this prohibition to all government contractors but, like the Franken Amendment, it only applies to contracts valued at more than $1 million. It does not, however apply to preexisting arbitration agreements unless the employer has discretion to modify the agreement and does so.

The controversial Executive Order will likely invite litigation by trade associations as to whether there is statutory authorization for the new requirements and whether the Executive Order conflicts with federal law, especially the Federal Arbitration Act (FAA), as well as policy statements in Title VII and the Civil Rights Act of 1991 that favor arbitration. In recent years, the Supreme Court has unambiguously ruled in favor of binding pre-dispute arbitration provisions as fulfilling the mandate of the Federal Arbitration Act. It has also ruled that binding pre-dispute arbitration provisions should be upheld unless there is a contrary Congressional command to override the FAA.

STAND ALONE HRAS, EMPLOYER PAYMENT PLANS AND THE ACA'S MOST OVERLOOKED EMPLOYER PENALTY

By Jessica B. Summers, Paley Rothman

Employers that currently sponsor employer payment plans or stand-alone health reimbursement arrangements, which likely violate the Patient Protection and Affordable Care Act (ACA), are running the risk of being liable for an excise tax of $100 per day, per plan participant. Unfortunately, many employers do not seem to know that their plans may now violate the ACA.

Since its passage, the vast majority of employer community attention given to the ACA as focused on the ACA's employer mandate. By now, most employers have a general understanding of the employer mandate. Unfortunately, many employers remain unaware of the ACA's additional restrictions and the related penalties that extend to the other health-related benefits they may have historically offered their employees.

Two of the most common types of benefits that have been significantly affected by the ACA are Employer Payment Plans (EPPs) and Health Reimbursement Arrangements (HRAs). The ACA also affected Flexible Spending Accounts (FSAs) and Health Savings Accounts (HSAs) but to a somewhat lesser extent. These latter types of benefits are not addressed in this article.

An EPP (as defined by IRS Notice 2013-54) is an arrangement under which the employer either (1) reimburses employees for the premiums that the employee has paid for health coverage that is not sponsored by the employer, or (2) makes direct premium payments to an insurance company for employee health coverage that is not sponsored by the employer. In 1961, the IRS (in Revenue Ruling 61-146) confirmed that these premium payments by the employer, (whether directly to the insurance company or in the form of a reimbursement to the employee), were excludable from an employee's gross income and permissible for the employer. Prior to the passage of the ACA, EPPs were seen as a good option for employers who wanted to help their employees cover the cost of obtaining health insurance but did not want to sponsor a plan themselves.

An HRA is a plan funded solely by the employer which reimburses employees for certain permitted medical expenses up to a set dollar amount. Reimbursements from an HRA are excluded from an employ-

ee's taxable income. Prior to the ACA, there were two types of HRAs that were permissible for employers to offer. Employers could offer a standalone HRA, which employees could use to, among other things, pay the premiums for a health plan not sponsored by the employer. In the alternative, employers could offer an HRA accompanied by a standard group health plan which employees could use to cover items not covered by the group health plan, such as prescriptions or co-pays. There is a definitional overlap between EPPs and HRAs. A standalone HRA established solely for the purpose of reimbursing premiums paid by employees for health plans not sponsored by the employer will, in practice, be a type of EPP.

Under the ACA, both EPPs and standalone HRAs will generally qualify as "group health plans." As such, each must comply with the ACA's requirements of a group health plan as articulated in 45 C.F.R. Part 147. These provisions, which apply to all group health plans that have at least two or more employee-participants on the first day of the plan year, include two requirements that, based on their very structure, EPPs and standalone HRAs will be unable to satisfy. First, non-grandfathered group health plans with plan years commencing on or after September 23, 2010, must provide coverage for preventative health services and may not impose any cost-sharing requirements on plan participants. See 45 C.F.R. § 147.130.

- Second, the ACA prohibits all group health plans (both grandfathered and non-grandfathered) from placing any annual or lifetime limits on the amount of benefits that may be paid for any individual. The prohibition against annual limits is applicable to group health plans with plan years beginning on or after January 1, 2014, while the prohibition against lifetime limits is applicable for plan years beginning on or after September 23, 2010. See 45 C.F.R. § 147.126

As set forth under 26 U.S.C. § 4980D, group health plans that do not comply with the ACA's requirements, including the preventative coverage and the benefit limit provisions, may be subject to an excise tax of $100 per day for each participant in the noncompliant plan. **In other words, an employer that maintains a group health plan (including an EPP or standalone HRA) that does not meet the ACA requirements for a year could liable for $36,500 in excise taxes for each participant.**

For EPPs there is no way around the preventative service and benefit limit rules. By its very nature, because the purpose of an EPP is to reimburse a set amount of premiums the EPP will not provide coverage for preventative services and will have a dollar limitation. IRS Notice 2013-54 makes it clear that an EPP's shortcomings cannot be cured by integrating the EPP with an individual health plan (i.e., the EPPs failure to meet the ACA requirements cannot be excused by the fact that the EPP is used to purchase individual health coverage that does meet the requirements). Under 29 C.F.R. § 2510.3-1(j) (as confirmed in IRS Notice 2013-14), employers can still establish a payroll practice essentially allowing employees to direct that a portion of their post-tax wages be forwarded directly to an insurance company to pay premiums. However, under such an arrangement, the employer may not contribute anything towards those premiums. **In short, the only remaining way for an employer that does not want to sponsor a health plan to help employees afford premiums would be to give employees a bonus or increase in salary that would be taxable to the employee and that that the employee could then choose to use for anything, including premiums.**

While the ACA has essentially made it impossible for employer's to offer EPPs without risking the excise tax, there are two circumstances under which employers may continue to offer HRAs to their employees without such risk. The primary way to do this is to "integrate" the HRA with a group health plan. In general, this means that the employer must offer employees a group health plan (other than the HRA) and that the HRA may only be available for employees who are actually enrolled in a group health plan (other than an HRA). This group health plan can be the employer's plan or a spouse's employer-sponsored plan but not an individually-purchased policy. Thus, because the employee simply needs to be offered a group health plan by the employer and enrolled in a group health plan, even if its not the employer's plan, an employee could enroll in his or her employer's integrated HRA and then use the money from that HRA to pay for coverage under his or her spouse's group health plan.

The other way that an employer may continue to offer an HRA to employees, and the only way employers can offer a standalone HRA without violating the ACA, is if the HRA only reimburses "excepted benefits" as defined by the ACA, which include limited vision and dental coverage. Excepted benefits are statutorily exempt from the ACA requirements and therefore HRAs that only cover excepted benefits are not subject to the group health requirements in the same way that broader standalone HRAs are.

For small employers who have failed to eliminate their EPPs, the IRS has recently offered some good news. On February 17, 2015, the IRS issued Notice 2015-17 providing transition relief for employers that had fewer than 50 full time employees and full time equivalents (i.e. those employers not subject to the employer mandate) in 2014 and continue to have less than 50 full time employees and full time equivalents through June 30, 2015. Under Notice 2015-17, these employers will have until June 30, 2015, to eliminate EPPs and avoid penalties. The Notice does not, however, provide relief for larger employers or for improper standalone HRAs being used for more than just reimbursing premiums.

Although the IRS has issued multiple notices on this issue, it does not appear to have begun to seek out violations. However Notice 2015-17 may be an indication that IRS is preparing to do so. In light of the fact that the § 4980D excise accrues on a daily basis, employers and their advisors should waste no time in reviewing the types of benefits that the employer offers to confirm compliance under the ACA provisions discussed above.

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1. *Available at* www.irs.gov/pub/irs-drop/n-13-54.pdf.
2. *Available at* www.irs.gov/pub/irs-drop/rr-61-146.pdf.
3. *Available at* www.irs.gov/pub/irs-drop/n-15-17.pdf.