

REGULATIONS

Pub. L. 110-233, title I, §102(d)(1), May 21, 2008, 122 Stat. 895, provided that: “Not later than 12 months after the date of enactment of this Act [May 21, 2008], the Secretary of Health and Human Services shall issue final regulations to carry out the amendments made by this section [see Effective Date of 2008 Amendment note above].”

ASSURING COORDINATION

Pub. L. 110-233, title I, §106, May 21, 2008, 122 Stat. 905, provided that: “Except as provided in section 105(b)(1) [42 U.S.C. 1320d-9 note], the Secretary of Health and Human Services, the Secretary of Labor, and the Secretary of the Treasury shall ensure, through the execution of an interagency memorandum of understanding among such Secretaries, that—

“(1) regulations, rulings, and interpretations issued by such Secretaries relating to the same matter over which two or more such Secretaries have responsibility under this title [enacting sections 300gg-53 and 1320d-9 of this title and section 9834 of Title 26, Internal Revenue Code, amending this section, sections 300gg-1, 300gg-22, 300gg-61, 300gg-91, and 1395ss of this title, sections 9802 and 9832 of Title 26, and sections 1132, 1182, and 1191b of Title 29, Labor, and enacting provisions set out as notes under this section, sections 1320d-9 and 1395ss of this title, section 9802 of Title 26, and section 1132 of Title 29] (and the amendments made by this title) are administered so as to have the same effect at all times; and

“(2) coordination of policies relating to enforcing the same requirements through such Secretaries in order to have a coordinated enforcement strategy that avoids duplication of enforcement efforts and assigns priorities in enforcement.”

§ 300gg-22. Enforcement**(a) State enforcement****(1) State authority**

Subject to section 300gg-23¹ of this title, each State may require that health insurance issuers that issue, sell, renew, or offer health insurance coverage in the State in the individual or group market meet the requirements of this part with respect to such issuers.

(2) Failure to implement provisions

In the case of a determination by the Secretary that a State has failed to substantially enforce a provision (or provisions) in this part with respect to health insurance issuers in the State, the Secretary shall enforce such provision (or provisions) under subsection (b) of this section insofar as they relate to the issuance, sale, renewal, and offering of health insurance coverage in connection with group health plans or individual health insurance coverage in such State.

(b) Secretarial enforcement authority**(1) Limitation**

The provisions of this subsection shall apply to enforcement of a provision (or provisions) of this part only—

(A) as provided under subsection (a)(2) of this section; and

(B) with respect to individual health insurance coverage or group health plans that are non-Federal governmental plans.

(2) Imposition of penalties

In the cases described in paragraph (1)—

(A) In general

Subject to the succeeding provisions of this subsection, any non-Federal governmental plan that is a group health plan and any health insurance issuer that fails to meet a provision of this part applicable to such plan or issuer is subject to a civil money penalty under this subsection.

(B) Liability for penalty

In the case of a failure by—

(i) a health insurance issuer, the issuer is liable for such penalty, or

(ii) a group health plan that is a non-Federal governmental plan which is—

(I) sponsored by 2 or more employers, the plan is liable for such penalty, or

(II) not so sponsored, the employer is liable for such penalty.

(C) Amount of penalty**(i) In general**

The maximum amount of penalty imposed under this paragraph is \$100 for each day for each individual with respect to which such a failure occurs.

(ii) Considerations in imposition

In determining the amount of any penalty to be assessed under this paragraph, the Secretary shall take into account the previous record of compliance of the entity being assessed with the applicable provisions of this part and the gravity of the violation.

(iii) Limitations**(I) Penalty not to apply where failure not discovered exercising reasonable diligence**

No civil money penalty shall be imposed under this paragraph on any failure during any period for which it is established to the satisfaction of the Secretary that none of the entities against whom the penalty would be imposed knew, or exercising reasonable diligence would have known, that such failure existed.

(II) Penalty not to apply to failures corrected within 30 days

No civil money penalty shall be imposed under this paragraph on any failure if such failure was due to reasonable cause and not to willful neglect, and such failure is corrected during the 30-day period beginning on the first day any of the entities against whom the penalty would be imposed knew, or exercising reasonable diligence would have known, that such failure existed.

(D) Administrative review**(i) Opportunity for hearing**

The entity assessed shall be afforded an opportunity for hearing by the Secretary upon request made within 30 days after the date of the issuance of a notice of assessment. In such hearing the decision shall be made on the record pursuant to section 554 of title 5. If no hearing is requested, the as-

¹ See References in Text note below.

assessment shall constitute a final and unappealable order.

(ii) Hearing procedure

If a hearing is requested, the initial agency decision shall be made by an administrative law judge, and such decision shall become the final order unless the Secretary modifies or vacates the decision. Notice of intent to modify or vacate the decision of the administrative law judge shall be issued to the parties within 30 days after the date of the decision of the judge. A final order which takes effect under this paragraph shall be subject to review only as provided under subparagraph (E).

(E) Judicial review

(i) Filing of action for review

Any entity against whom an order imposing a civil money penalty has been entered after an agency hearing under this paragraph may obtain review by the United States district court for any district in which such entity is located or the United States District Court for the District of Columbia by filing a notice of appeal in such court within 30 days from the date of such order, and simultaneously sending a copy of such notice by registered mail to the Secretary.

(ii) Certification of administrative record

The Secretary shall promptly certify and file in such court the record upon which the penalty was imposed.

(iii) Standard for review

The findings of the Secretary shall be set aside only if found to be unsupported by substantial evidence as provided by section 706(2)(E) of title 5.

(iv) Appeal

Any final decision, order, or judgment of the district court concerning such review shall be subject to appeal as provided in chapter 83 of title 28.

(F) Failure to pay assessment; maintenance of action

(i) Failure to pay assessment

If any entity fails to pay an assessment after it has become a final and unappealable order, or after the court has entered final judgment in favor of the Secretary, the Secretary shall refer the matter to the Attorney General who shall recover the amount assessed by action in the appropriate United States district court.

(ii) Nonreviewability

In such action the validity and appropriateness of the final order imposing the penalty shall not be subject to review.

(G) Payment of penalties

Except as otherwise provided, penalties collected under this paragraph shall be paid to the Secretary (or other officer) imposing the penalty and shall be available without appropriation and until expended for the

purpose of enforcing the provisions with respect to which the penalty was imposed.

(3) Enforcement authority relating to genetic discrimination

(A) General rule

In the cases described in paragraph (1), notwithstanding the provisions of paragraph (2)(C), the succeeding subparagraphs of this paragraph shall apply with respect to an action under this subsection by the Secretary with respect to any failure of a health insurance issuer in connection with a group health plan, to meet the requirements of subsection (a)(1)(F), (b)(3), (c), or (d) of section 2702¹ or section 2701¹ or 2702(b)(1)¹ with respect to genetic information in connection with the plan.

(B) Amount

(i) In general

The amount of the penalty imposed under this paragraph shall be \$100 for each day in the noncompliance period with respect to each participant or beneficiary to whom such failure relates.

(ii) Noncompliance period

For purposes of this paragraph, the term "noncompliance period" means, with respect to any failure, the period—

- (I) beginning on the date such failure first occurs; and
- (II) ending on the date the failure is corrected.

(C) Minimum penalties where failure discovered

Notwithstanding clauses (i) and (ii) of subparagraph (D):

(i) In general

In the case of 1 or more failures with respect to an individual—

- (I) which are not corrected before the date on which the plan receives a notice from the Secretary of such violation; and
- (II) which occurred or continued during the period involved;

the amount of penalty imposed by subparagraph (A) by reason of such failures with respect to such individual shall not be less than \$2,500.

(ii) Higher minimum penalty where violations are more than de minimis

To the extent violations for which any person is liable under this paragraph for any year are more than de minimis, clause (i) shall be applied by substituting "\$15,000" for "\$2,500" with respect to such person.

(D) Limitations

(i) Penalty not to apply where failure not discovered exercising reasonable diligence

No penalty shall be imposed by subparagraph (A) on any failure during any period for which it is established to the satisfaction of the Secretary that the person

otherwise liable for such penalty did not know, and exercising reasonable diligence would not have known, that such failure existed.

(ii) Penalty not to apply to failures corrected within certain periods

No penalty shall be imposed by subparagraph (A) on any failure if—

(I) such failure was due to reasonable cause and not to willful neglect; and

(II) such failure is corrected during the 30-day period beginning on the first date the person otherwise liable for such penalty knew, or exercising reasonable diligence would have known, that such failure existed.

(iii) Overall limitation for unintentional failures

In the case of failures which are due to reasonable cause and not to willful neglect, the penalty imposed by subparagraph (A) for failures shall not exceed the amount equal to the lesser of—

(I) 10 percent of the aggregate amount paid or incurred by the employer (or predecessor employer) during the preceding taxable year for group health plans; or

(II) \$500,000.

(E) Waiver by Secretary

In the case of a failure which is due to reasonable cause and not to willful neglect, the Secretary may waive part or all of the penalty imposed by subparagraph (A) to the extent that the payment of such penalty would be excessive relative to the failure involved.

(July 1, 1944, ch. 373, title XXVII, §2723, formerly §2722, as added Pub. L. 104-191, title I, §102(a), Aug. 21, 1996, 110 Stat. 1968; amended Pub. L. 110-233, title I, §102(a)(5), May 21, 2008, 122 Stat. 891; renumbered §2736, renumbered §2723, and amended Pub. L. 111-148, title I, §§1001(4), 1563(c)(13), formerly §1562(c)(13), title X, §10107(b)(1), Mar. 23, 2010, 124 Stat. 130, 269, 911.)

REFERENCES IN TEXT

Section 300gg-23 of this title, referred to in subsec. (a)(1), was in the original section “2723”, and was translated as meaning section 2724 of act July 1, 1944, to reflect the probable intent of Congress and the renumbering of section 2723 as 2724 by Pub. L. 111-148, title I, §§1001(4), 1563(c)(14)(B), formerly §1562(c)(14)(B), title X, §10107(b)(1), Mar. 23, 2010, 124 Stat. 130, 269, 911.

Section 2702, referred to in subsec. (b)(3)(A), is a reference to section 2702 of act July 1, 1944. Section 2702, which was classified to section 300gg-1 of this title, was amended by Pub. L. 111-148, title I, §1201(3), Mar. 23, 2010, 124 Stat. 154, and was transferred to subsecs. (b) to (f) of section 300gg-4 of this title, effective for plan years beginning on or after Jan. 1, 2014. A new section 2702, related to guaranteed availability of coverage, was added by Pub. L. 111-148, title I, §1201(4), Mar. 23, 2010, 124 Stat. 156, effective for plan years beginning on or after Jan. 1, 2014, and is classified to section 300gg-1 of this title.

Section 2701, referred to in subsec. (b)(3)(A), is a reference to section 2701 of act July 1, 1944. Section 2701, which was classified to section 300gg of this title, was renumbered section 2704, effective for plan years beginning on or after Jan. 1, 2014, with certain exceptions, and amended, by Pub. L. 111-148, title I, §1201(2),

1563(c)(1), formerly §1562(c)(1), title X, §10107(b)(1), Mar. 23, 2010, 124 Stat. 154, 264, 911, and was transferred to section 300gg-3 of this title. A new section 2701 of act July 1, 1944, related to fair health insurance premiums, was added, effective for plan years beginning on or after Jan. 1, 2014, and amended, by Pub. L. 111-148, title I, §1201(4), title X, §10103(a), Mar. 23, 2010, 124 Stat. 155, 892, and is classified to section 300gg of this title.

PRIOR PROVISIONS

A prior section 2723 of act July 1, 1944, was renumbered section 2724 and is classified to section 300gg-23 of this title.

AMENDMENTS

2010—Subsec. (a)(1). Pub. L. 111-148, §1563(c)(13)(A)(i), formerly §1562(c)(13)(A)(i), as renumbered by Pub. L. 111-148, §10107(b)(1), substituted “individual or group market” for “small or large group markets”.

Subsec. (a)(2). Pub. L. 111-148, §1563(c)(13)(a)(ii), formerly §1562(c)(13)(A)(ii), as renumbered by Pub. L. 111-148, §10107(b)(1), inserted “or individual health insurance coverage” after “group health plans”.

Subsec. (b)(1)(B). Pub. L. 111-148, §1563(c)(13)(B), formerly §1562(c)(13)(B), as renumbered by Pub. L. 111-148, §10107(b)(1), inserted “individual health insurance coverage or” after “with respect to”.

2008—Subsec. (b)(3). Pub. L. 110-233 added par. (3).

EFFECTIVE DATE OF 2008 AMENDMENT

Amendment by Pub. L. 110-233 applicable, with respect to group health plans and health insurance coverage offered in connection with group health plans, for plan years beginning after the date that is one year after May 21, 2008, and, with respect to health insurance coverage offered, sold, issued, renewed, in effect, or operated in the individual market, after the date that is one year after May 21, 2008, see section 102(d)(2) of Pub. L. 110-233, set out as a note under section 300gg-21 of this title.

EFFECTIVE DATE

Section applicable with respect to group health plans, and health insurance coverage offered in connection with group health plans, for plan years beginning after June 30, 1997, except as otherwise provided, see section 102(c) of Pub. L. 104-191, set out as a note under section 300gg of this title.

§ 300gg-23. Preemption; State flexibility; construction

(a) Continued applicability of State law with respect to health insurance issuers

(1) In general

Subject to paragraph (2) and except as provided in subsection (b) of this section, this part and part C of this subchapter insofar as it relates to this part shall not be construed to supersede any provision of State law which establishes, implements, or continues in effect any standard or requirement solely relating to health insurance issuers in connection with individual or group health insurance coverage except to the extent that such standard or requirement prevents the application of a requirement of this part.

(2) Continued preemption with respect to group health plans

Nothing in this part shall be construed to affect or modify the provisions of section 1144 of title 29 with respect to group health plans.

(b) Special rules in case of portability requirements

(1) In general

Subject to paragraph (2), the provisions of this part relating to health insurance coverage