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Employer Penalty Solution Debunked

There has been some talk in practitioner circles as well as national newspapers about strategies to get around the employer penalty rules. These strategies are the result of some very tortured and winding analysis under Treasury's ACA guidance to date. As you know, I'm all about legal maneuvering, but all the twists and turns are too involved to discuss here. But, most of the strategies involve some type of preventive care, mini-med or HRA offering to get around the 4980H (a) penalty, where minimum value and affordability aren't required. Then, because Treasury's minimum essential coverage rules are such a low bar, the employer is able to avoid the 4980H(b) penalty because such coverage prevents the employee from being eligible for tax credits. If allowed to stand this would be an end run around the employer penalty rules.

Various newspaper articles have cited unnamed IRS sources as "blessing" this type of approach. When I read those, I always thought the unnamed sources were the actual protestors outside the IRS building, not the officials working inside the building. No IRS or Treasury official that is involved in ACA compliance has endorsed these approaches. In fact, many have said they don't approve of these approaches. However, because the regulatory process is somewhat slow and insular, it's hard to officially react to everything being marketed (just look at all the double-dip arrangements that don't qualify under the cafeteria plan rules as an example). But, I suspect that the agencies will be issuing guidance soon about these arrangements, and it won't be to endorse them.