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# TAMRA: Your COBRA Compliance Assistant

*By Rich Glass, JD*

If you have ever struggled with the complexities of COBRA administration, you should be aware that a 20-year-old guide named TAMRA can help. No, TAMRA is not a person. Instead, TAMRA is a law: the Technical and Miscellaneous Revenue Act of 1988.

The assistance is not provided in the law itself, but in an accompanying report that the IRS still uses to this day. On a single paragraph on page 483 of Senate Report 100-445, members of Congress provided the guidelines that govern when the IRS should issue excise taxes for noncompliance with COBRA rules. These excise taxes can reach as high as \$100 per day,

\$200 per day if more than one qualified beneficiary in the same family is involved.

In the report, Congress gave the IRS four factors for deciding when and if to waive the excise tax. These four factors are listed in the IRS COBRA Examination User's Guide, which is used during plan audits. The IRS must first determine the cause of the COBRA failure. Was it due to reasonable cause or was it willful neglect? Willful neglect exists in two situations:

- the employer does not implement the four TAMRA factors; or

See *TAMRA*, p. 13

## Cornerstones to a Good COBRA Foundation: The Four TAMRA Factors

Here are the four TAMRA criteria, outlined in Senate Report 100-445, for deciding when and if to waive the excise tax for COBRA noncompliance:

- **Training.** The difficulty with some COBRA training is that it is of short duration and occurs on the former COBRA person's last day of work. The prudent practice is to designate the person or persons responsible for COBRA and ensure they are properly trained on all aspects of COBRA. This training should include the whole range of COBRA, including qualifying events, notices, payments and termination of coverage. Even employers that outsource COBRA need to designate an internal person to handle some COBRA duties like qualifying event reporting. Once the employee has completed the training, keep a copy of the evidence of the training.
- **Written instructions.** It has been said that "with a good script, a good director can produce a masterpiece." Once trained, these individuals need to follow written procedures in performing their COBRA obligations. A COBRA TPA should be able to provide these instructions if and when needed, especially if a COBRA lawsuit or IRS audit arises.
- **Design and updates.** The COBRA program must be designed based on competent professional advice. The advice may include legal and actuarial resources. It is important to understand that COBRA is a law that is constantly being shaped and evolved by court decisions, agency rulings and regulations and other laws. Therefore, the program needs to be updated based on changes in the law or circumstances related to the employer. For example, any employer that is using a notice that has not changed in the last four years is not in compliance with the U.S. Department of Labor's final regulations that took effect in 2004.
- **Monitoring.** The entire program must be monitored by independent auditors who are well versed in COBRA law. Double-checking your work is not enough. The best practice is that the monitoring be done by an external person or company that specializes in COBRA. 🏠

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## **Fiduciary Breach** (continued from page 8)

want to assume that type of responsibility. Indeed, employers typically do not want their TPAs acting as fiduciaries either — that may make it harder for an employer to exercise control over plan administration.

In any case, several steps could be taken to help ensure that a TPA does not become a fiduciary. (See sidebar.)

Of course, any service agreement language and training should be undertaken with the benefit of an expert in the evolving legal requirements for ERISA fiduciary status.

## **TAMRA** (continued from page 12)

- the employer fails to correct the COBRA mistake within 30 days of when the employer knew or should have known of the error.

Reasonable cause exists when an employer meets all the TAMRA factors. If the error is due to reasonable cause, the IRS can waive the penalty. The IRS is not permitted to waive the penalty in cases of willful neglect.


Simply put, the four TAMRA factors are the cornerstones to a good COBRA foundation. This is true whether an employer handles COBRA administration internally or outsources this responsibility to a third-party administrator. (See sidebar on previous page.)

As a side note, the IRS issued proposed regulations in July 2008 that address how employers should report excise tax liability. They must file Form 8928 (which had not been issued as of this writing) and remit the penalty payment no later than the following tax day. (See September 2008 newsletter.)

Of course, IRS excise taxes are not the only liability concern for an employer. Lawsuits are also a concern. Most cases are decided, however, on an employer's ability or failure to following the four TAMRA criteria.

Each year, the IRS audits thousands of health plans on various legal requirements, including COBRA. When it comes to COBRA, employers have a helpful assistant who can eliminate compliance failures and mitigate their consequences: TAMRA.


### **For More Information**

A copy of the TAMRA criteria in the Senate Report is available at: [www.infinisource.net/Infinisource/Benefit\\_Resources/docs/Senate%20Conf.%20Rpt.%20100-445%20\(TAMRA\).pdf](http://www.infinisource.net/Infinisource/Benefit_Resources/docs/Senate%20Conf.%20Rpt.%20100-445%20(TAMRA).pdf). 

In particular, recent proposed regulations from the U.S. Department of Labor address the type of provisions that must be included in service provider agreements related to fees and fee arrangements. These regulations, if finalized, will require service providers and plan administrators to review the status of all agreements to make sure that there is a clear understanding of the plan-related fees and how they will be paid.


Finally, the *Briscoe* decision points out the risks involved in a typical services agreement provision on termination. Many agreements will provide that if the service provider has funds on hand at the agreement's termination, it will refund those amounts to the employer, after it deducts any fee for services rendered. Because these provisions are called for in the agreement, many service providers would take the position that acting in accordance with the provision (that is, deducting fees and refunding the remainder to the employer) would not make the service provider a fiduciary.

As *Briscoe* points out, however, this view is not necessarily going to hold up in court. Once the service provider is on notice that the employer is in a bad financial situation, and the assets on hand relate to premiums or other funds used to pay claims under the employer's plan, the service provider needs to think twice before just turning the money over to the (soon-to-be bankrupt) employer. In deciding between employees who lost health coverage or a bankrupt employer's creditors, the courts are more likely to find a way to resolve the issue in the employees' favor.

In light of all these concerns, it is crucial for TPAs and employers to review their practices and make any necessary changes. 

## **How to Ensure a TPA Does Not Become a Fiduciary**

Steps that could be taken to help ensure that a TPA does not become a fiduciary include:

- 1) Clarifying in the service agreement with the TPA exactly what the TPA's status is expected to be.
- 2) Clarifying the services to be performed and the extent to which the TPA is acting in accordance with written specific directions whenever it processes payments from a plan account.
- 3) Providing training for the TPA and its employees as well as those employees at the employer responsible for plan activities so that all people involved with the plan know exactly the extent of their responsibilities. 

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