

## Chart of Disallowed Pay or Play Tactics

Disallowed Tactic	Reason(s) Disallowed	Source of Authority	Penalties	Comments
<b>Pre-tax reimbursement of employees' individual policy premiums</b>	Whether or not it is set up as a Health Reimbursement Arrangement (HRA) under Internal Revenue Code ("Code") § 105, this comprises a group health plan subject to the ACA's group market reforms, including the prohibition on annual limits and the requirement to provide preventive services without cost-sharing. Because the annual benefit is limited to the cost of individual premiums, the plan fails the prohibition on annual limits.	IRS Notice 2013-54; ACA FAQ XXII	Excise taxes under Code § 4980D (\$100 per day, per affected individual). Capping or waiver of the tax in instances where failure is due to reasonable cause, and not willful neglect, may not be available given the widespread nature of the IRS and other agency guidance.	HRAs or other employer payment plans can never be integrated with (and hence insulated from ACA requirements) individual coverage, only with ACA-compliant group health coverage.
<b>Post-tax reimbursement of employees' individual policy premiums</b>	Same as above; post-tax reimbursement process still comprises a group health plan subject to ACA market reforms.	ACA FAQ XXII	Same as above.	Simply increasing employees' taxable compensation, without any express premium reimbursement feature, would still seem to be permitted.
<b>Code § 105 plan tied to third-party vendor of individual coverage</b>	Same as first entry; sourcing individual coverage through a third party vendor does not change the fact that the reimbursement arrangement is a group health plan subject to ACA group market reform requirements and does not meet the prohibition on annual benefit limits.	ACA FAQ XXII	Same as above.	Note that these "105" arrangements may be offered with the promise that employees reimbursed for individual coverage will still qualify for premium tax credits on the health exchange. Because the reimbursement arrangement constitutes Minimum Essential Coverage, no premium tax credits (or cost-sharing) are available.
<b>Cash offer to high risk claims employees who opt out of employer group health plan</b>	Directing this benefit to persons with high claims risk comprises discrimination on the basis of a health factor in violation of ERISA and HIPAA; employee who remains enrolled is treated as having paid the forfeited cash for coverage, in addition to his or her premium contribution. Cash offer could also cause Section 125 plans to fail nondiscrimination rules.	ACA FAQ XXII	Same as above; Code §4980D excise taxes also apply to violations of HIPAA's nondiscrimination rules. Favorable tax treatment under Code § 125 may be lost if nondiscrimination requirements are not met.	Agencies promise further guidance on why the cash offer does not comprise permitted "benign" discrimination.
<b>Plans that carve-out Hospitalization and/or Physician Services</b>	Post-hoc decision by IRS that HHS Minimum Value Calculator (which deemed carve-out plans to provide MV) is flawed and that hospitalization and physician services are essential to MV.	IRS Notice 2014-69; Proposed HHS Regulations re: Benefit and Payment Parameters for 2016	Presumably, potential exposure to Code §4980H(b) taxes for failure to offer MV coverage.	Transition relief permits employers that, as of November 4, 2014, had entered into a binding written commitment to offer a carve-out plan or had begun enrolling employees in such a plan to maintain it for plan years beginning no later than March 1, 2015. Employees will still be eligible for premium tax credits but no Code Section 4980H(b) penalty will apply to the employer with regard to MV.

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