



# Board of County Commissioners Agenda Request



**Requested Meeting Date:** 10/13/2015

**Title of Item:** Health Insurance Update 2016

<input checked="" type="checkbox"/> REGULAR AGENDA <input type="checkbox"/> CONSENT AGENDA <input type="checkbox"/> INFORMATION ONLY	<b>Action Requested:</b> <input checked="" type="checkbox"/> Approve/Deny Motion <input type="checkbox"/> Adopt Resolution (attach draft)	<input checked="" type="checkbox"/> Direction Requested <input type="checkbox"/> Discussion Item <input type="checkbox"/> Hold Public Hearing* <small>*provide copy of hearing notice that was published</small>
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<b>Submitted by:</b> Bobbie Danielson	<b>Department:</b> Administration/HR
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<b>Presenter (Name and Title):</b> Bobbie Danielson, HR Director and Nate Burkett, County Administrator	<b>Estimated Time Needed:</b> 15
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**Summary of Issue:**

7/28/2015 Minutes - Nathan Burkett, County Administrator, discussed employee health insurance with the Board. Motion by Commissioner Napstad, seconded by Commissioner Niemi and carried, all members voting yes to authorize spending budgeted monies of \$2,500 to \$5,000 in order to move forward with planning.

Following the 7/28/2015 meeting, Halleland and Habicht PA was hired to review and analyze documentation and IRS Codes to determine if the Hybrid Plan was compliant with the Affordable Care Act. Halleland and Habicht law firm spent 44.10 hours on this review.

In addition to Halleland and Habicht, opinions on the Hybrid Plan were sought from MCIT, the Northeast Service Cooperative's attorney Mark Kinney, AFSCME Council 65 (their attorneys in Washington D.C. reviewed the documentation), Attorney Darcy Hitesman, and County Attorney Jim Ratz. A summary of each is attached for your review.

Briefly, there does not appear to be a specific prohibition against a group health plan design exactly like the Hybrid Plan, but if federal regulators determine it does not meet ACA requirements and were to impose fines, the County could be subject to est. penalties of either \$162k (non compliance due to reasonable cause and not to willful neglect) to \$5.2 million (non compliance due to willful neglect or otherwise not due to reasonable cause). The IRS has not defined the terms "wilful neglect" or "reasonable cause" in the context of ACA excise taxes. Travelers Insurance will not reimburse the County for fines or penalties incurred because the policy excludes "taxes".

The Insurance Committee would like to solicit a written advisory opinion from the IRS/DOL/HHS.

**Alternatives, Options, Effects on Others/Comments:**

Options:  
 (1) Move to the Hybrid Plan 1/1/2016, assuming a risk of up to \$5.2 million/year in fines/penalties/taxes.  
 (2) Stay w/the NESC/BCBS Plan 1/1/2016, and receive a 12% premium increase. Request tri-agency advisory opinion.

**Recommended Action/Motion:**

Board discussion and direction.

**Financial Impact:**

Is there a cost associated with this request?  Yes  No

What is the total cost, with tax and shipping? \$ 2016: County \$1,443,576, EEs \$371,514

Is this budgeted?  Yes  No *Please Explain:*

Based on current elections, a 12% increase to the BCBS/NESC plan would equal a total premium increase (employee plus employer) of \$194,328 for 2016.  
 Side note: Also considered L49 and THF plans & put out RFP for health insurance (fully and self-insured quotes).

**Aitkin County  
Hybrid Plan, Summary of Opinions  
September 21, 2015**

**Review with Insurance Committee on October 5, 2015  
Review with County Board on October 13, 2015**

MCIT Summary

MCIT provides risk management – not legal – advice on contracts. The contracts and plan documents necessary for a health plan requires a level of scrutiny and review that exceeds MCIT's areas of expertise. As a result, we are unable to comment on the Plan's compliance with the requirements of the Affordable Care Act. The question of whether this Plan (or any plan) is compliant with the Act is probably unknown until it is tested in a court of law. If Aitkin County was sued by a third party (including an employee) seeking damages resulting from its selection and implementation of the Plan, MCIT coverage would likely not apply. Generally, fines and penalties are not included in the definition of damages and are therefore not covered by MCIT. If a claim is presented to Aitkin County, we recommend submitting it for a final coverage determination. We are not aware of a market for these types of exposures.

Given the county's potential exposure when administering employee health and benefits it seems most prudent to seek out and rely upon the advice of an expert in this highly specialized area of law. You have experience in working with Ms. Hitesman and have also developed a relationship with Mr. Burt. Both are learned in the area of employee benefits and health plans. MCIT is unable to comment or offer a recommendation on this plan.

Darcy Hitesman, Hitesman & Wold Summary

Based on a careful reading of the Affordable Care Act (ACA) statute and a literal reading of what the IRS has said (and not said), the Hybrid Plan satisfies the applicable requirements of the ACA. It covers preventative care services. And because the "covered services" other than the preventative care services are not essential health benefits (EHBs), the Hybrid Plan does not violate the annual and lifetime maximum prohibitions the ACA imposes with respect to EHBs. Furthermore, based upon a literal reading of what the IRS has said (and what it has not said), the Hybrid Plan's use of individual policies is not a prohibited "employer payment plan." While the ACA does not specifically say the Hybrid Plan is compliant, it also does not say the type of arrangement illustrated by the Hybrid Plan is prohibited.

Nothing in the regulatory guidance issued to date prohibits a group health plan that is subject to the ACA coverage mandates from including a coordination of benefits provision that makes the plan secondary to other coverage.

The regulatory agencies have identified the preventive care mandate as a key compliance problem for "employer payment plans" (i.e., arrangements under which employers provide funding for the purchase of individual insurance policies). Under the view of the agencies, an employer payment plan that only reimburses/pays the cost of an individual insurance policy does not comply because the employer payment plan itself does not cover preventive care (and the

employer cannot take credit for the benefits provided by the employee's insurance policy). To address this issue, the minimum value Hybrid Plan is designed to provide coverage for preventative care.

The characteristics of the Hybrid Plan are significantly different from what the IRS has labeled "employer payment plans". The Hybrid Plan is a legitimate self-insured medical plan consisting of at least two types of covered services, preventive care services and payment of premium costs. The Hybrid Plan is not a mere payment vehicle for individual policies purchased by an individual.

Note: Please consider the following caveats as you review this memorandum. First, the Internal Revenue Service (IRS) has made known informally that it does not want employers involved in assisting employees purchase of medical insurance policies in the individual insurance market. Accordingly, it is possible the IRS would object to the use of a hybrid health care plan approach. Second, the IRS has expressed significant concern regarding "employer payment plans" through which an employer pays for (or reimburses) the participant's cost for individual insurance coverage. Third, the implementation of many of the ACA provisions remains in flux. In some cases, the regulatory agencies have yet to issue final regulations implementing certain ACA provisions. In other cases, the regulatory agencies have issued final regulations and other guidance but they have also indicated future guidance is possible. Accordingly, an employer adopting a hybrid health care plan approach described herein must continue to monitor all future regulatory guidance to determine whether any such future guidance impacts the ability or advisability of using this approach. Finally, the information contained herein is intended to be a general discussion of the application of existing law to this approach. The information contained herein is intended only for your personal use. This memorandum is not intended to constitute a legal opinion or legal advice for any employer who is considering adopting the hybrid health care plan approach. Any such employer should seek the advice of qualified legal counsel before adopting this approach. The information contained in this memorandum is accurate as of its date. The hybrid health care plan approach could be affected by future legislative action, regulatory action, court decisions, and regulatory enforcement efforts. An employer should consult qualified legal counsel before implementing the hybrid health care plan approach to determine whether any legal developments have occurred since the date of this memorandum that would impact the use of this approach.

Jim Ratz, Aitkin County Attorney

In reviewing some of the materials on the IRS website, I have concerns as to whether the Nexben plan complies with the ACA. Aside from Nexben's attempt to re-badge their plan with such terms as "hybrid" or "self-insured," Nexben appears to be selling an employer payment plan. Such plans according to the IRS do not appear comply with the ACA. See e.g., Notice 2013-54, section III, answer 1, and Notice 2015-17 reiterating and reaffirming Notice 2013-54. Absent Nexben obtaining an advisory opinion from the IRS as to whether the plan complies, I would be very hesitant to be the test case as to whether the plan complies. The potential penalties are substantial.

### Ryan Burt, Halleland Habicht Summary

While we are unaware of a direct, specific prohibition against a group health plan design exactly like the Hybrid Plan under consideration, there is federal guidance addressing similar plan arrangements that has uniformly found the group health plan to be separate from the individual policy and thus the group health plan is unable to utilize the benefits provided under the individual policy to comply with ACA requirements such as the prohibition on annual limits and employer shared responsibility provisions. We believe that given the general hostility shown by federal regulators toward plan designs similar to the Hybrid Plan under consideration, it is likely that federal regulators will apply the prior rationale to the Hybrid Plan design and find that it does not meet ACA requirements. If federal regulators were to make such a determination it could result in financial liability for the County, including fines and civil monetary penalties. If the County decides to move forward with the Hybrid Plan design, we recommend conducting an analysis of the potential magnitude of financial liability that could be incurred if federal regulators were to impose fines, civil monetary penalties or other financial liability upon the County as a result of implementing the Hybrid Plan design.

### Mark Kinney, Kinney & Larson, LLP

Group health plans that provide preventive care along with payment or reimbursement of premiums for individual policies of insurance are based on interpretations of Notice 2013-54. Notice 2013-54 generally prohibits employers from paying for or reimbursing individual policies of insurance. Though Notice 2013-54 is capable of more than one interpretation, and does not directly address the type of arrangement being promoted, the public policy behind the guidance is to end the practice of employer payment or reimbursement of individual policies of insurance. If federal regulators issue future guidance on these issues, it is likely [to] be consistent with this policy. But the absence of guidance that is directly on point should not be read as tacit approval of these arrangements by federal regulators. Concerns may be raised in an IRS audit, for example, and future guidance prohibiting these arrangements could apply retroactively to the effective dates in Notice 2013-54. In the worst case scenario, employers that pay for or reimburse individual policies of insurance, whether or not part of a preventive care plan, may be assessed a penalty of \$100 per day for each employee enrolled in the program, or \$36,000 per employee per year.

The decision by federal regulators to issue “guidance” without adequate supporting legal analysis invites competing interpretations. Reasonable minds may differ. Whether a preventive care plan that pays individual premiums creates a plan comprised of preventive care and individual policies is unclear. But the public policy behind Notice 2013-54 appears to be to prevent employers from replacing traditional group health plans with payment mechanism for individual policies, so that plan sponsors with poor claims experience will not transfer these risks to the exchanges. If the Notice does not address plans designed to avoid the prohibition, it should not be construed as a safe harbor for such arrangements. Ultimately, an employer that chooses to reimburse individual policies through an arrangement that also provides preventive care will assume risk that is difficult to quantify. Whether the risk is worth the benefit is for employers to determine with the advice of legal and tax professionals.

**Return of Certain Excise Taxes Under  
 Chapter 43 of the Internal Revenue Code**  
 (Under sections 4980B, 4980D, 4980E, and 4980G)

OMB No. 1545-2148

► Information about Form 8928 and its separate instructions is at [www.irs.gov/form8928](http://www.irs.gov/form8928).

Filer's tax year beginning _____ and ending _____	
<b>A</b> Name of filer (see instructions)	<b>B</b> Filer's employer identification number (EIN)
<b>See Page 2 for Worst-case Penalty Estimates</b>	
Number, street, and room or suite no. (if a P.O. box, see instructions)	
City or town, state or province, country, and ZIP or foreign postal code	<b>E</b> Plan sponsor's EIN
<b>C</b> Name of plan	<b>F</b> Plan year ending (MM/DD/YYYY)
<b>D</b> Name and address of plan sponsor	<b>G</b> Plan number

**Part I Tax on Failure To Satisfy Continuation Coverage Requirements Under Section 4980B**

Complete a separate Part I, lines 1 through 6, for failures due to reasonable cause and not to willful neglect, and a separate Part I, lines 12 through 14, for other failures, for each qualifying event for which one or more failures to satisfy continuation coverage requirements that occurred during the reporting period (see instructions).

**Section A – Failures Due to Reasonable Cause and Not to Willful Neglect**

		For IRS Use Only	
<b>1</b> Enter the total number of days of noncompliance in the reporting period . . . . .		<b>1</b>	
<b>2</b> Enter the number of qualified beneficiaries for which a failure occurred as a result of this qualifying event . . . . . <span style="float:right; border: 1px solid black; padding: 2px;">2</span>	<b>2</b>		
<b>3</b> If you entered 2 or more on line 2, multiply line 1 by \$200. Otherwise, multiply line 1 by \$100		<b>3</b>	
<b>4</b> If the failure was not discovered despite exercising reasonable diligence or was corrected within the correction period and was due to reasonable cause, enter -0- here, and go to line 5. Otherwise, enter the amount from line 3 on line 6 and go to line 7 . . . . .		<b>4</b>	
<b>5</b> If the failure was not corrected before the date a notice of examination of income tax liability was sent to the employer and the failure continued during the examination period, multiply \$2,500 by the number of qualified beneficiaries for whom one or more failures occurred (multiply by \$15,000 to the extent the violations were more than <i>de minimis</i> for a qualified beneficiary). If the failures were corrected before the date a notice of examination was sent, enter -0- . . . . .		<b>5</b>	
<b>6</b> Enter the smaller of line 3 or line 5 . . . . .		<b>6</b>	
<b>7</b> If there was more than one qualifying event, add the amounts shown on line 6 of all forms, and enter the total on a single "summary" form. Otherwise, enter the amount from line 6 above . . . . .		<b>7</b>	
<b>8</b> Enter the aggregate amount paid or incurred during the preceding tax year for a single employer group health plan or the amount paid or incurred during the current tax year for a multiemployer health plan to provide medical care . . . . . <span style="float:right; border: 1px solid black; padding: 2px;">8</span>	<b>8</b>		
<b>9</b> Multiply line 8 by 10% (.10) . . . . .		<b>9</b>	
<b>10</b> Amount from section 4980B(c)(4) . . . . .		<b>10</b>	500,000
<b>11</b> Enter the smallest of lines 7, 9, or 10. For a third-party administrator, HMO, or insurance company, the amount you enter on this line filed for all plans you administer during the same tax year cannot exceed \$2 million; reduce the amount you would otherwise enter on this line to the extent the amount for all plans would exceed this limit . . . . .		<b>11</b>	

**Section B – Failures Due to Willful Neglect or Otherwise Not Due to Reasonable Cause**

<b>12</b> Enter the total number of days of noncompliance in the reporting period . . . . .		<b>12</b>	
<b>13</b> Enter the number of qualified beneficiaries for which a failure occurred as a result of this qualifying event . . . . . <span style="float:right; border: 1px solid black; padding: 2px;">13</span>	<b>13</b>		
<b>14</b> If you entered 2 or more on line 13, multiply line 12 by \$200. Otherwise, multiply line 12 by \$100.		<b>14</b>	
<b>15</b> If there was more than one qualifying event, add the amounts shown on line 14 of all forms, and enter the total on a single "summary" form. Otherwise, enter the amount from line 14 above . . . . .		<b>15</b>	

**Section C – Total Tax Due Under Section 4980B**

<b>16</b> Add lines 11 and 15 . . . . . ►	<b>126</b>	<b>16</b>	
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*144 employees  
100 spouses/dependents  
244 total*

Name of filer: **ESTIMATES ONLY BASED ON CURRENT PARTICIPATION**

Filer's EIN:

**Part II Tax on Failure To Meet Portability, Access, Renewability, and Other Requirements Under Section 4980D**

Complete a separate Part II, lines 17 through 23, for failures due to reasonable cause and not to willful neglect, and a separate Part II, lines 29-32, for other failures to meet certain group health plan requirements that occurred during the reporting period (see instructions).

**Section A - Failures Due to Reasonable Cause and Not to Willful Neglect**

		For IRS Use Only	
17	Enter the total number of days of noncompliance in the reporting period		17 365
18	Enter the number of individuals to whom the failure applies	18 144	
19	Multiply line 17 by line 18	19 52,560	
20	Multiply line 19 by \$100		20 5,256,000
21	If the failure was not discovered despite exercising reasonable diligence or was corrected within the correction period and was due to reasonable cause, enter -0- here, and go to line 22. Otherwise, enter the amount from line 20 on line 23 and go to line 24		21 0
22	If the failure was not corrected before the date a notice of examination of income tax liability was sent to the employer and the failure continued during the examination period, multiply \$2,500 by the number of qualified beneficiaries for whom one or more failures occurred (multiply by \$15,000 to the extent the violations were more than <i>de minimis</i> for a qualified beneficiary). If the failures were corrected before the date a notice of examination was sent, enter -0-		22 610,000
23	Enter the smaller of line 20 or line 22		23 610,000
24	If there was more than one failure, add the amounts shown on line 23 of all forms, and enter the total on a single "summary" form. Otherwise, enter the amount from line 23 above		24 610,000
25	Enter the aggregate amount paid or incurred during the preceding tax year for a single employer group health plan or the amount paid or incurred during the current tax year for a multiemployer health plan to provide medical care	25 (ER+EE) \$1,620,762	
26	Multiply line 25 by 10% (.10)		26 162,076.20
27	Amount from section 4980D(c)(3)		27 500,000
28	Enter the smallest of lines 24, 26, or 27		28 162,076.20

**Section B - Failures Due to Willful Neglect or Otherwise Not Due to Reasonable Cause**

29	Enter the total number of days of noncompliance in the reporting period		29 365
30	Enter the number of individuals to whom the failure applies	30 144	
31	Multiply line 29 by line 30	31 52,560	
32	Multiply line 31 by \$100		32 5,256,000
33	If there was more than one failure, add the amounts shown on line 32 of all forms, and enter the total on a single "summary" form. Otherwise, enter the amount from line 32 above		33 5,256,000

**Section C - Total Tax Due Under Section 4980D**

34	Add lines 28 and 33	127 34
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**Part III Tax on Failure To Make Comparable Archer MSA Contributions Under Section 4980E**

35	Aggregate amount contributed to Archer MSAs of employees within calendar year	35
36	Total tax due under section 4980E. Multiply line 35 by 35% (.35)	128 36

**Part IV Tax on Failure To Make Comparable HSA Contributions Under Section 4980G**

37	Aggregate amount contributed to HSAs of employees within calendar year	37
38	Total tax due under section 4980G. Multiply line 37 by 35% (.35)	137 38

**Part V Tax Due or Overpayment**

39	Add lines 16, 34, 36, and 38	39
40	Enter amount of tax paid with Form 7004	40
41	<b>Tax due.</b> Subtract line 40 from line 39. If less than zero, enter -0-, and go to line 42. If the result is greater than zero, enter here and attach a check or money order payable to "United States Treasury." Write your name, identifying number, plan number, and "Form 8928" on your payment	41
42	<b>Overpayment.</b> Subtract line 39 from line 40	42

**Sign Here**

Under penalties of perjury, I declare that I have examined this return, including accompanying schedules and statements, and to the best of my knowledge and belief, it is true, correct, and complete. Declaration of preparer (other than taxpayer) is based on all information of which preparer has any knowledge.

\_\_\_\_\_  
Your signature Telephone number \_\_\_\_\_ Date \_\_\_\_\_

**Paid Preparer Use Only**

Print/Type preparer's name	Preparer's signature	Date	Check <input type="checkbox"/> if self-employed	PTIN
Firm's name	Firm's EIN			
Firm's address	Phone no.			

BCBS/NESC Premiums, 2016 Renewal

	2015 Actual	2016 <i>Actual</i> 12%	Employer <i>Pays</i> 2016 /month	Employee <i>Pays</i> 2016 /month
<u>Veba 100</u>				
Single	\$ 733.50	\$ 821.50	\$ 675.00	\$ 146.50
Family	\$ 2,200.50	\$ 2,464.50	\$ 1,250.00	\$ 1,214.50
 <u>Veba 80</u>				
Single	\$ 631.00	\$ 706.50	\$ 700.00	\$ 6.50
Family	\$ 1,891.50	\$ 2,118.50	\$ 1,300.00	\$ 818.50
 <u>HDHP</u>				
Single	\$ 535.00	\$ 599.00	\$ 700.00	\$ -
Family	\$ 1,603.50	\$ 1,796.00	\$ 1,300.00	\$ 496.00