EXCLUSIVE

Blue Cross Blue Shield plans in California evaded $170 million in taxes, whistleblower says

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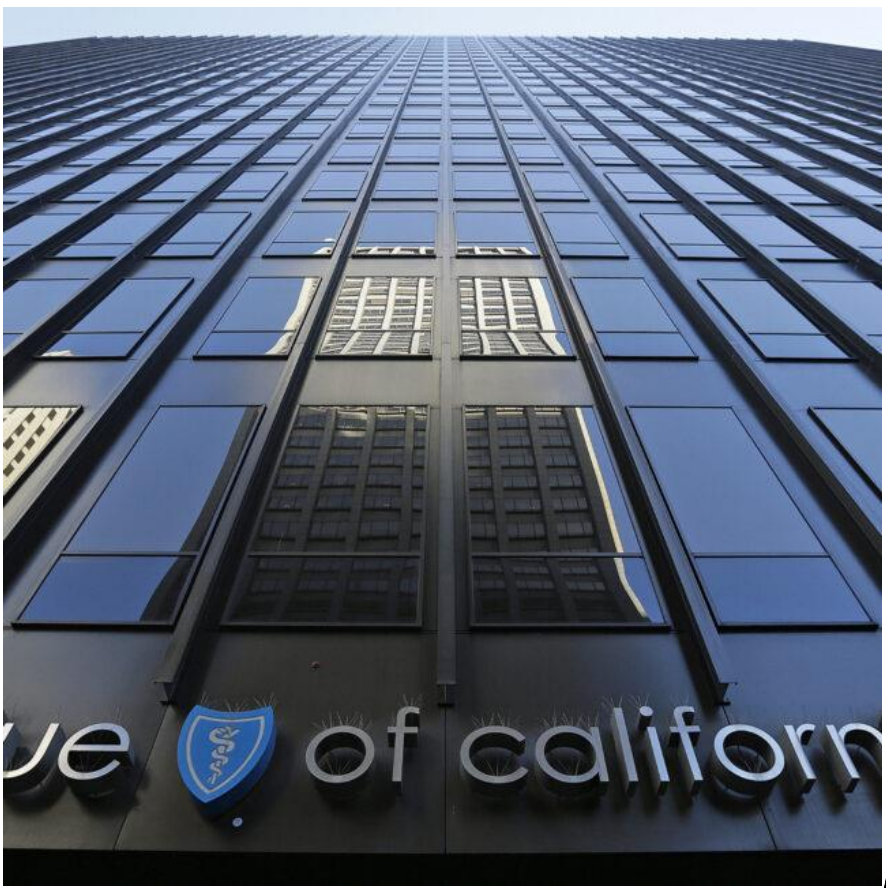
By Bob Herman July 17, 2023



ERIC RISBERG/AP

Two dominant Blue Cross Blue Shield companies in California intentionally underreported premiums of certain health plans so they could avoid paying Affordable Care Act taxes, according to new federal whistleblower complaints.

These claims renew concerns about whether health insurance companies have skirted the tax code and to what extent tax fraud could exist in the industry.

Blue Shield of California evaded $111 million in taxes between 2016 and 2020, according to a complaint that was filed with the Internal Revenue Service on June 27. Elevance Health, the parent company of Anthem Blue Cross in California, evaded $60 million in taxes during the same time period, according to a separate complaint filed with the IRS.

If the IRS finds Blue Shield violated tax laws, the insurer could owe more than $300 million, an amount that would include the unpaid taxes as well as penalties for committing fraud. Elevance could owe $165 million. If successful, whistleblowers are eligible to receive between 15%-30% of whatever the IRS collects.

Michael Johnson, a former Blue Shield employee who worked at the insurer for 12 years, filed the latest documents to the IRS and shared them with STAT. Johnson, who left Blue Shield in 2015, also filed a similar complaint about Blue Shield in 2018 that was reported by California Healthline. The IRS dismissed that complaint as being "speculative."

Johnson said he filed the new complaints because he gathered more evidence showing Blue Shield had evaded the taxes required by the Affordable Care Act, and added a complaint against Elevance.

"[The insurers'] attitude seems to be — when you factor in the likelihood that they'll get away with it and a minimal penalty if they actually get caught — it's a good business decision to cheat," Johnson said. "It's utterly brazen."

Blue Shield said in a statement it "is a taxpaying nonprofit health plan, and we pay taxes in a manner that's consistent with the law." The company added the complaint "is yet another baseless accusation by a former disgruntled employee" who is "re-airing the same grievances he already raised in an earlier unsuccessful complaint to the IRS."

Elevance did not respond to requests for comment.

The heart of Johnson's latest allegations mirrors those from several years ago: that Blue Shield and Elevance purposefully undercounted premiums in order to pay less toward the ACA's health insurance tax. The premiums were tied to products known as "flex-funded" plans that were sold to employers.

There are generally two types of employer health insurance plans: fully insured and self-insured. Fully insured plans are those in which a health insurer charges premiums to employers, and then the insurer assumes all the risk of paying those employers' medical claims. Self-insured plans are those in which employers pay for their workers' medical claims out of their own bank account, and then hire health insurers to perform backend tasks.

"Flex-funded" plans are a hybrid of fully and self-insured. Employers who buy those plans from Blue Shield or Elevance only have to pay medical claims up to a certain threshold before the insurance company becomes responsible.

Premiums from fully insured plans were subject to the ACA's tax. Self-insured plans were not. California regulators at the state Department of Managed Health Care previously said in an audit that a flex-funded plan "assumes the risk for health care services," which would imply flex-funded plans would be treated as fully insured and therefore subject to the ACA's tax, according to the complaint. However, the DMHC told STAT in a statement that the term "fully insured" is not defined in California insurance law, and "that is not a part of the Department's review." The IRS, meanwhile, has said flex-funded plans should indeed be treated as fully insured and not self-insured.

The ACA's health insurance tax went into effect in 2014, but Congress suspended it in 2017 and 2019. Congress then fully repealed it starting in 2021. However, the tax was still in effect the other five years — 2014, 2015, 2016, 2018, and 2020. Insurers broadly said they passed on the tax to employers and consumers by raising premiums.

Blue Shield knew flex-funded plans had to be taxed — because that's what its executives previously argued to California officials, according to documents filed with the complaints. In 2015, Blue Shield complained its competitor, Elevance, was not paying ACA taxes on its flex-funded plans, and doing so gave Elevance an "unfair marketplace advantage." By not paying taxes, and consequently not passing on those costs to the employer, Elevance was able to offer a cheaper and potentially more attractive product, according to Blue Shield.

"It has long been Blue Shield's understanding that [California regulators] consider these flex-funded arrangements to be 'fully insured,'" Blue Shield's former general counsel, Seth Jacobs, wrote in a 2015 letter to California regulators. "This is how Blue Shield has been accounting for and reporting flex-funded premium revenue for almost 20 years," Jacobs added.

Yet, "despite its own legal conclusion that excluding flex-funded HMO revenue from premium amounts … constituted tax evasion, [Blue Shield of California] did exactly that," the complaint reads. Blue Shield started telling its flex-funded plan clients that it was no longer passing on the ACA tax due to a "change in [state] guidance," and the insurer removed billions of dollars of flex-funded revenue from its tax forms filed to the IRS.

However, there didn't appear to be a change in guidance from California regulators, and Blue Shield said as much in a statement. "[California regulators] ultimately responded saying they would not take a position on this issue. That being the case, we decided to follow the other major carriers in our market to bring parity with our competitors who were able to underprice their products because they did not report premiums as we did and, as a result, did not pay the commensurate ACA tax," Blue Shield said in its statement.

California regulators told STAT in a statement they have "not issued any opinion regarding the applicability of the ACA premium tax on flex-funded plans." However, state officials told Johnson in communications they broadly viewed flex-funded plans as fully insured products. Those communications were made part of the complaint, although California regulators told STAT that "should not be interpreted as guidance on how the IRS would approach the application of premium taxes to flex-funded plans."

"Blue Shield knew this product was taxable. They absolutely knew it, and pointed that out to California regulators," Johnson said. "And then they decide, you know, screw it. [Elevance] is going to not pay the tax on this premium. We're not going to either."

Elevance also "never abandoned" its practice of avoiding taxes on its flex-funded plans, "even after Blue Shield complained," Johnson's other complaint says.

Elizabeth Plummer, an accounting professor at Texas Christian University who specializes in health care taxation, reviewed the broad claims at STAT's request. She said businesses always try to exploit loopholes to lower their tax bills — a strategy that is common among Blue Cross Blue Shield plans. But Blue Shield ignoring its own original legal view that flex-funded plans are taxable appears to be problematic, she said.

"There is ambiguity in tax law. You try to take advantage of the ambiguity that's within the bounds of the law, but that doesn't seem to be what they did," Plummer said. "It basically looks like they committed fraud."

Kathy Hempstead, a senior policy adviser and health insurance expert at the Robert Wood Johnson Foundation who also reviewed the complaints at STAT's request, said the ACA's insurance tax was "begrudged from the onset." But she said she'd never seen any company go beyond public grumbling.

"It's maybe a unique kind of intersection with a quirky state law," Hempstead said of how California regulates flex-funded plans. "But it does make you wonder: What other companies, what other states, what other instances are there where this tax should have been paid but wasn't?"

The story has been updated to reflect updated comments from the California Department of Managed Health Care.

About the AuthorReprints

Bob Herman
Business of Health Care Reporter