February 18, 2016

Submitted via email to Notice.comments@irscounsel.treas.gov

CC:PA:LPD:PR (Notice 2015-87)
Room 5203
Internal Revenue Service
P.O. Box 7604
Ben Franklin Station
Washington, DC 20044

Re: Notice 2015-87 – Guidance on the Application of Various Provisions of the Affordable Care Act to Employer-Provided Health Coverage

Dear Sir or Madam:

We write on behalf of the American Benefits Council ("Council") to provide comment in connection with Notice 2015-87 ("Notice") regarding certain guidance provided in the Notice that may be incorporated into future regulations promulgated by the Department of the Treasury and the Internal Revenue Service (collectively, the "Department"). The relevant guidance relates to the interpretation of certain provisions of the Patient Protection and Affordable Care Act ("ACA") and existing regulations and impacts the obligations of employers that sponsor group health plans.

The Council is a public policy organization representing principally Fortune 500 companies and other organizations that assist employers of all sizes in providing benefits to employees. Collectively, the Council's members either sponsor directly or provide services to health and retirement plans that cover more than 100 million Americans.

The Council appreciates the Department's efforts through the release of Notice 2015-87 to clarify significant issues that have arisen under the ACA, and specifically Internal Revenue Code ("Code") Section 4980H, related Code provisions, and Department regulations. Employers that sponsor group health plans continue to face uncertainty

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regarding the operation and interpretation of the ACA's tax provisions, including the employer shared responsibility requirements of Code Section 4980H and the Department's final regulations. We support additional clarifying guidance subject to public notice and comment. Allowing for meaningful public comment will help ensure that rulemaking is informed by stakeholder input, while minimizing the adverse consequences and costs for employers and their employees, as well as their plans.

As discussed in greater detail below, several of the Q&As set forth in the Notice provide clarifying guidance that may be inconsistent with how employers are currently administering their plans in connection with the employer shared responsibility provisions of Code Section 4980H. In the absence of clarifying guidance, many employers adopted reasonable interpretations of the Department's existing guidance, and did so in good faith. As a result, some employers' interpretations may not wholly align with the Department's interpretation as set forth in the Notice. To ensure that employers have adequate time to implement any new clarifying guidance, the Council urges the Department to make such guidance prospective to ensure that employers have sufficient time to make adjustments to their practices and benefit administration in order to come into full compliance.

The comments that follow address issues for which the Department has specifically requested comments in Notice 2015-87.

Q&A 9: "OPT-OUT" PAYMENTS

Notice 2015-87 states that if an employee is offered a payment that is only available if the employee declines coverage in a group health plan, this scenario is no different than requiring an employee to reduce his or her compensation to pay for employer-provided health coverage. Notice 2015-87 further states the Department's intention to issue regulations reflecting that such "unconditional opt-out arrangements" are treated in the same manner as salary reduction for purposes of determining the affordability of coverage. For example, if an employee's contribution toward a plan is generally $200 per month, but the employee is also offered $100 per months in taxable wages if she declines the coverage, the employee's required contribution would be considered $300 per month- in other words, the coverage would be considered less affordable and an applicable large employer would have greater exposure to employer shared responsibility penalties.

The Council believes this analysis is flawed and that the Department's position benefits neither the employer nor the employee. For example, assume a relatively typical scenario where an employee's annual salary is $30,000 and the employer offers a health plan where the employer pays 80% of the premium and the employee pays 20% of the premium. The annual premium for self-only coverage is $6,000, so if the employee elects self-only coverage, she has the option of reducing her salary by $100 a month ($1,200 annually) to pay for coverage. As a result, her annual taxable wages would be $28,800 if she elects coverage, with the employer paying $4,800 on behalf of this employee for coverage. This coverage would be considered affordable under the safe harbors set forth in the employer shared responsibility rules (the employee premium for self-only coverage is only 4.17% of her W-2 wages).

If the employee opts out of coverage, the employer has effectively saved the $4,800 contribution it otherwise would have had to make for health coverage- so it would be reasonable for the employer to elect at its discretion to provide some opt-out payment to the employee in the form of additional taxable wages. If the employer offers the employee an additional $200 monthly in taxable wages to the employee for opting out, the employee's annual salary increases by 8% from $30,000 to $32,400, and the employer saves the difference between what would have been the employer contribution for health coverage and what it paid the employee for the opt-out (plus taxes on the additional wages).

Under the guidance set forth in Notice 2015-87, the choice of receiving additional compensation if the employee opts out of the employer coverage would count against the affordability of the health coverage. Thus, using our example, if the employee is offered the choice of an opt-out payment, the cost of the coverage would be considered to be $300 a month. As a result, the employee's coverage would no longer be considered affordable under the employer shared responsibility rules (the employee premium for self-only coverage would be 111% of her W-2 wages) and would expose the employer to potential penalties under Code Section 4980H(b).

The Council is concerned that the Department's position on unconditional opt-out payments as set forth in Notice 2015-87 may result in employers either eliminating opt-out incentives altogether, or significantly curtailing them to ensure they do not negatively affect the "affordability" of the employee's coverage. Additionally, employees who choose to opt out of the offered employer-sponsored coverage will not only fail to receive any health coverage from their employers, but also will not be able to enjoy any (or as much) additional wages in the form of an opt-out payment from the employer.

The Department's current position could also cause some employees to over-insure against health risk. This is because, if the employer opt-out payment is reduced and/or eliminated altogether, some employees could elect to enroll in the employer-sponsored coverage even where he or she has access to other meaningful major medical coverage (such as TRICARE or spousal coverage). The practical effect is that these employees could end up enrolled in unnecessary or duplicative coverage.

Notwithstanding our concerns regarding the Department's general position, we appreciate that the Department has expressly reserved on the issue of opt-out arrangements that are conditioned not only on the employee declining employer-sponsored coverage, but on the employee satisfying certain other conditions (e.g. the employee providing proof of having other coverage). If the Department proceeds with the position on opt-out arrangements as set out in Notice 2015-87, the Council recommends that the Department "carve out" arrangements that are conditioned on the employee providing proof of other coverage. In these situations, the employee clearly is foregoing nothing by declining the coverage, and would merely be left without additional wages if the Department were to extend its current position on opt-out payments generally to this type of conditional arrangement.

In addition, if the Department carves out opt-out arrangements that are conditioned on the employee providing proof of other coverage, we encourage future guidance to clarify that if the employee loses access to the alternative coverage in the middle of the plan year, the determination of the affordability of the coverage under Code Sections 36B and 5000A (and as those Sections relate to Code Section 4980H(b)) for the remaining months in the plan year will not be impacted by the opt-out incentive. This would only be reasonable given that the offering of the incentive would have been conditioned on the assumption that the alternative coverage would remain intact for the entire plan year.

Finally, we note that Q&A 10 sets forth the Department's position on a related issue, which is how employer payments for fringe benefits made pursuant to the McNamara-O'Hara Service Contract Act ("SCA"), the Davis-Bacon Act, or the Davis-Bacon Related Acts (collectively with the Davis-Bacon Act, the "DBRA") are taken into account for purposes of determining whether an applicable large employer has made an offer of affordable minimum value coverage. In Q&A 10, the Department states that employer fringe benefit payments under SCA or DBRA that can be used to pay for coverage under an employer-sponsored health plan will be counted toward affordability for purposes of employer mandate compliance, to the extent the amount doesn't exceed the amount required to satisfy the employer's SCA or DBRA requirements.

We support the approach set out in this guidance. This issue has been a significant concern for Council members with SCA and DBRA obligations. The Department's position as set forth on Q&A 10 reflects a practical approach that serves both employers and the employees that benefit under SCA and DBRA arrangements.

Q&A 12: ADJUSTMENT TO THE AFFORDABILITY PROVISIONS UNDER § 36B(C)(2)(C)(IV)

Code Section 36B(c)(2)(C)(iv) provides that in the case of plan years beginning after 2014, the Secretary shall adjust the 9.5% affordability threshold under §36B(c)(2)(C)(i)(II) in the same manner as the percentages are adjusted under § 36B(b)(3)(A)(ii). Previously, Rev. Proc. 2014-37 adjusted the 9.5% threshold to 9.56% for plan years beginning in 2015, and Rev. Proc. 2014-62 further adjusted the threshold to 9.66 percent for plan years beginning in 2016.

Notice 2015-87 provides that all of the following will be administered consistent with the adjustment to the 9.5% under Section 36B(c)(2)(C)(iv): (1) the affordability safe harbors under § 54.4980H-5(e); (2) the reference to an offer of coverage under § 54.4980H-4; (3) the multiemployer plan interim relief described in Section XV.E of the preamble to the final regulations under § 4980H; and (4) the definition of a "qualifying offer" for purposes of § 301.6056-1(j)(1) (reporting by applicable large employers). For these purposes, the applicable percentage will be 9.56% for plan years beginning in 2015 and 9.66% for plan years beginning in 2016.

The Council supports the Department's position that these provisions be adjusted consistent with the affordability threshold of Code Section 36B(c)(2)(C)(iv). Administering these provisions in a consistent manner will help reduce confusion for all stakeholders, including employers and their employees.

Q&A 14: HOURS OF SERVICE FOR PERIODS OF DISABILITY UNDER CODE SECTION 4980H

Generally, under the employer shared responsibility rules, an hour of service is defined as an hour for which an employee is paid, or entitled to payment, for the performance of duties, including certain hours for which no duties are performed due to vacation, illness, incapacity, layoff, jury duty, military duty, or leave of absence, as defined in 29 CFR 2530.200b-2(a). *See* Treas. Reg. § 54.4980H-1(a)(24).

Whether or how employers are to credit employees with hours of service for purposes of determining an employee's full-time status has been an ongoing source of some uncertainty for employers. A long-standing question is whether and, if so, how employers must credit hours of service for periods during which an employee is on paid leave for a disability, including short-term and long-term disability. For example, there is uncertainty as to how the crediting rules apply to an employee who is on long-term versus short-term disability leave, and where the disability income protection is self-insured versus insured through a third party commercial insurer, or where coverage is paid with after-tax versus pre-tax contributions. The Council requested clarification regarding crediting hours of service for periods of disability in its comment letter to the Department's proposed regulations submitted March 18, 2013.

With respect to this issue, Notice 2015-87 states:

> [A] payment is deemed to be made by or due from an employer regardless of whether the payment is made by or due from the employer directly, or indirectly through, among others, a trust fund or insurer to which the employer contributes or pays premiums... Accordingly, periods during which an individual is not performing services but is receiving payments due to short-term disability or long-term disability result in hours of service for any part of the period during

which the recipient retains status as an employee of the employer, *unless the payments are made from an arrangement to which the employer did not contribute directly or indirectly.*

We read the above language to mean that employees receiving disability payments must be credited with hours of service for periods during which they receive such payments, regardless of whether the coverage is insured or self-funded, and regardless of whether the employee is on short-term or long-term disability leave, except as noted below.

With regard to the underlined language above, Notice 2015-87 further states that "a disability arrangement for which the employee paid with after-tax contributions (so that the benefits received under the arrangement are excluded from income under § 104(a)(3)) would be treated as an arrangement to which the employer did not contribute, and payments from the arrangement would not give rise to hours of service." We request that any future rulemaking clearly affirm that to the extent the disability coverage is paid for by an employee with after-tax contributions (including as a result of an employer's imputation of taxable wages to the employee as a result of the coverage), such payments do not give rise to an hour of service for purpose of Code Section 4980H.

Another aspect of the Department's regulations that has resulted in significant employer confusion is whether the reference in the final Department regulations to 29 CFR Section 2530.200b-2(a)(2) should, and/or could, be read to allow an employer to limit the number of hours taken into account to 501 hours on account of any single continuous period during which the employee performs no duties. If so, this would limit an employer's obligation to credit hours of service to individuals receiving disability benefits under Code Section 4980H (even though those are technically hours for which the individual is "paid, or entitled to payment").

Notice 2015-87 clarifies that, "the reference to 29 CFR § 2530.200b-2(a) was not intended to incorporate the limitation on hours of service contained in 29 CFR § 2530.200b-2(a)(2)(i)," and goes on to state that, "there is no 501-hour limit on the hours of service required to be credited to an employee on account of any single continuous period during which the employee performs no duties if the hours of service would otherwise qualify as hours of service."

In the absence of clarifying guidance, employers have set up their systems for administering their employer shared responsibilities based upon a reasonable and good faith reading of the Department's final regulations In doing so, employers may have applied a 501 hour limitation to the crediting of hours of service based upon the express reference to such hour limitation in 29 CFR § 2530.200b-2(a)(2)(i). These employers now will be required to credit employees receiving disability payments (whether insured or self-funded) with additional hours of service for periods during which they receive such payments, even if such hours exceed the 501 hour limitation set forth in 29 CFR § 2530.200b-2(a)(2)(i).

We strongly request that any clarifying guidance have a prospective effective date so that employers have sufficient time to modify their plans and Code Section 4980H administration in order to come into compliance with Department's clarified rule on crediting hours of service. Given the long-standing uncertainty surrounding whether or how to credit hours of service during periods during which an individual is receiving payments due to disability and lack of clarifying guidance, employers have had to engage in reasonable, good faith interpretations of the Department's final regulation since, for most employers, the employer shared responsibility rules took effect on January 1, 2015. It should be expected that the Department's current interpretation may not wholly align with employers' past good faith interpretations of the final regulations.

Notice 2015-87 states that the Department "intend to include [the clarifications set forth in Q&A 14] as proposed regulations under § 4980H effective as of December 16, 2015." To ensure that employers have sufficient time to implement this new guidance the Council s requests that the Department apply any guidance related to Q&A 14 no sooner than the earlier of (i) January 1, 2017, or (ii) the start of the employer's standard measurement period beginning on or after July 1, 2016 (to the extent the employer uses the look-back method for determining full-time status). Employers need sufficient time to determine which of their disabled employees should be offered coverage to satisfy the Code Section 4980H requirements, and most will have already completed enrolling employees for 2016 coverage (assuming they administered an open enrollment period in late 2015).

Finally, to the extent the Department intends to issue regulations requiring employers to credit certain employees who are receiving disability benefits but are not performing duties with "hours of service" under Code Section 4980H, the Council requests that the Department provide clear guidance regarding exactly how those hours of service should be credited. The 4980H regulations provide generally that an employee paid on an hourly basis should be credited with hours of service based on records of hours worked and an hour for which payment is due. Treas. Reg. §54.4980H-3(b)(2). Employees paid on a non-hourly basis can be credited with hours of service using the same methodology, or by using a days-worked equivalency or a weeks-worked equivalency. Treas. Reg. §54.4980H-3(b)(3).

None of these methodologies (actual hours worked or the equivalencies) are particularly applicable to employees receiving disability benefits – many of whom receive benefits that are based on a percentage of pre-disability earnings, and that are sometimes offset for other income (e.g. Social Security disability benefits). Accordingly, we request clarification regarding permissible methodologies for crediting hours of service to employees who are receiving disability benefits and are not actively at work. To that end, the Council recommends the adoption of a rule that would allow employers to use any reasonable methodology provided that it does not substantially understate an employee's hours of service relative to the compensation that is being provided. For example, if an employer's long-term disability plan pays an employee 80% of his pre-disability earnings, it should be deemed reasonable for an employer to adopt a methodology that credits the employee with 80% of the hours of service he or she earned in the plan year or calendar year prior to the onset of the employee's disability.

Q&A 15: STAFFING AGENCIES PROVIDING SERVICES TO EDUCATIONAL ORGANIZATIONS

Under the Code Section 4980H regulations, an employee who resumes providing service to an employer after a period during which the employee was not credited with any hours of service generally may be treated as having terminated employment and been rehired (and therefore a new employee) if the employee did not have an hour of service for a period of at least 13 consecutive weeks. For employees of educational organizations, however, the rule is modified so that the employee would not have been considered a new employee unless he or she had a break of 26 weeks without an hour of service. We understand that this was intended to prevent educational organizations from being able to treat ongoing employees as new employees if they earned no hours of service during a scheduled academic break that exceeds 13 weeks.

In Notice 2015-87, the Department indicates that it intends "to amend the regulations under § 4980H to address the application of the special rehire rules under §§ 54.4980H-3(c)(4)(ii) and 54.4980H-3(d)(6)(ii) to employees who primarily perform services for one or more educational organizations." Specifically, the Department states that "some educational organizations are attempting to avoid application of these rules by, for example, using a third-party staffing agency for certain individuals providing services... Accordingly, [the Department] intend[s] to propose amendments to the regulations under § 4980H to provide for application of the special rule in certain circumstances in which the services are being provided to one or more educational organizations, even if the employer is not an educational organization."

We are very concerned that the Department's proposed course of action could have significant unintended consequences that may detrimentally impact schools, the employers which provide services to them, and their employees.

It is our understanding that educational organizations (including public schools) commonly have longstanding relationships with private employers that provide services to those schools, some of which have been in place for many years. For example, public schools may contract with private companies who operate bus services to provide the buses that transport children to and from school. These arrangements may be governed by collective bargaining agreements. The action contemplated by the Department could result in a significant administrative burden for these types of employers, as they now would have to administer their Code Section 4980H obligations to account for two separate break in service rules—one for the employees that are providing services to an educational organization, and another for its other employees who are providing services to other organizations. This will undoubtedly result in extra cost to the employer, which would likely be passed on to the school district or educational organization.

Notice 2015-87 states that the special break rules that apply to employees of educational organizations would also apply "to any employee providing services primarily to one or more educational organizations for whom a meaningful opportunity to provide services during the entire year (to an educational organization or any other type of service recipient) is not made available." These standards are ambiguous and would create significant compliance uncertainty for employers that provide services to educational organizations particularly as to what it means to provide services "primarily" to an educational organization and what would constitute a "meaningful opportunity" in this context.

The Council requests that the Department take a measured approach with respect to the issue identified in Q&A 15, which would avoid significant disruption of arrangements between schools and service providers – arrangements that may predate the Code Section 4980H rules. This could include, for example, revising regulations to provide that if an educational organization contracts with a staffing agency for the purpose of abusing the "break in service" rules set forth in Treas. Reg. §§ 54.4980H-3(c)(4) and 54.4980H-3(d)(6), the longer 26-week period will be applied. The Council believes that targeting the rule at the employers which are attempting to exploit the break-in-service rules – as is asserted in Q&A 15- is a more practical approach then creating a new, sweeping obligation that has the potential to unnecessarily and detrimentally impact employers, as well as school systems and other educational organizations.

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Thank you for considering these comments submitted in response to the Notice. If you have any questions or would like to discuss these comments further, please contact us at (202) 289-6700.

Sincerely,

Kathryn Wilber
Senior Counsel
Health Policy