



AMERICAN BENEFITS COUNCIL

June 15, 2011

Submitted electronically via e-mail to Notice.comments@irsounsel.treas.gov.

Internal Revenue Service
CC:PA:LPD:PR (Notice 2011-36)
Room 5203
P.O. Box 7604
Ben Franklin Station
Washington, DC 20044
Notice.Comments@irsounsel.treas.gov

Re: Notice 2011-36: Request for Comments on Shared Responsibility for Employers Regarding Health Coverage (Section 4980H)

Sir or Madam:

We write to provide comments on behalf of the American Benefits Council (“Council”) in response to Internal Revenue Service (“IRS”) Notice 2011-36, Request for Comments on Shared Responsibility for Employers Regarding Health Coverage (Section 4980H) (“Notice”), issued on May 3, 2011. The Council represents primarily large employers and other organizations that collectively either sponsor or administer health and retirement benefits covering over 100 million Americans.

We thank the IRS for the opportunity to provide comments in connection with employer shared responsibility under section 4980H of the Internal Revenue Code of 1986, as amended (“Code”), and we hope that our comments, set forth below, will assist the IRS in building upon the foundation for future guidance laid out in the Notice.

We start by commending the IRS for its approach in issuing the Notice. In particular, we applaud the IRS’s responsiveness to employer concerns regarding month-to-month eligibility determinations. We also very much appreciate the general proposed methodologies described in the Notice and the process the IRS is using to solicit comments prior to issuing proposed regulations. Our comments are intended to help advance the shared goal set forth in Notice 2011-36 that the procedures needed to implement the

“shared responsibility” provisions of the Affordable Care Act should minimize undue burdens to employers, build on existing practices and provide needed flexibility in meeting the new requirements. We also believe that this approach, with the clarifications recommended in our comments, will help to promote the goal of helping employees to keep the coverage they now have as central elements of the new law become effective starting in 2014.

DEFINITION OF “EMPLOYER” AND APPLICATION OF CONTROLLED GROUP RULES

The Notice provides that all entities treated as a controlled group or an affiliated service group under Code section 414(b), (c), (m), or (o) are treated as a single employer for purposes of Code section 4980H, and, thus, that all employees of such a group are taken into account in determining whether any member of the group is an applicable large employer for purposes of Code section 4980H. We urge the IRS to issue guidance regarding certain issues related to the controlled group or affiliated service group rules as described below.

Clarify Applicability of Employer Responsibilities for Bona Fide Differences in Workforces. At present, many employers make health coverage decisions based on bona fide differences in their workforces, including differing geographic locations, separate lines of business, and collectively bargained status. Maintaining such an approach with respect to the application of Code section 4980H(a) will help to ensure that more employees will have coverage under employer-sponsored plans, as opposed to having to seek coverage in the exchanges. It also would help to avoid undue cost and burden for those employers with highly diverse workforces. Such burden and cost could cause some to eliminate coverage entirely if section 4980H(a) were applied across the employer’s entire control group. This approach would also avoid requiring coverage for employees with respect to whom it may be inappropriate – even impossible – to provide coverage.

We urge the IRS to adopt rules with respect to Code section 4980H(a) that permit employers to retain discretion in making health coverage decisions, so long as such decisions are based on legitimate business reasons and are not based on employees’ health status. In this regard, we believe employers should retain discretion not only to decline coverage to appropriate categories of employees in the entirety; they should also be able to provide different levels of coverage so long as the coverage meets the standards set forth in Code section 4980H. In its consideration of this issue, we encourage the IRS to take into account the increased exchange participation and subsidy eligibility likely to result if this issue is not addressed in future guidance.

Take Existing Regimes into Account. In connection with its rulemaking efforts regarding Code section 4980H, we urge the IRS to take account of existing nondiscrimination rules for self-insured arrangements and the new nondiscrimination rules regarding insured group health plans. It is imperative that rules regarding Code section 4980H be coordinated with the existing nondiscrimination rules; otherwise, any employer discretion

provided in connection therewith may be lost. To this end, we understand that the agencies are continuing to work on guidance regarding section 2716 of the Public Health Service Act (“PHSA”) as well as a potential revision to the regulations under Code section 105(h). We hope as part of this process that the agencies will consider and address how these provisions will interface with Code section 4980H. One approach supported by the Council would be to establish a safe harbor for purposes of Code section 4980H pursuant to which an employer would not run afoul of any applicable nondiscrimination testing rules as a result of distinguishing among various categories of full-time employees based on legitimate business reasons.

OTHER ISSUES RELATING TO DEFINITIONS

Definition of “Hours of Service.” We urge the IRS to define “hours of service” to include only hours which an employee actually works and to not include hours for which no work is performed, *e.g.*, layoff, leave of absence, jury duty, military duty. A contrary rule is cumbersome and hard to administer. Additionally, it may have the effect of overstating employment status and rendering certain employees as full-time (notwithstanding that they performed services giving rise to part-time employment based on hours worked). We also urge the IRS to permit additional methods of measuring full-time employee status, *e.g.*, allow employers to use an average of hours over more than one week such as an average of 130 hours per month versus an average of 30 hours per week.

Definition of “Full-Time Employee” for Automatic Enrollment. The Notice makes clear that the IRS is working with the Department of Labor (“DOL”) in coordinating guidance with respect to Code section 4980H, as well as PPACA’s provisions regarding automatic enrollment and the permissible 90-day waiting period. We commend the IRS and the Department of Labor (“DOL”) for coordinating their efforts in developing regulations and guidance regarding with respect thereto. With respect to automatic enrollment, we note that the Fair Labor Standards Act (“FLSA”) does not include a definition of “employer” for purposes of automatic enrollment. Nonetheless, we acknowledge that the definition of “employer” is relevant for multiple purposes under the Patient Protection and Affordable Care Act (“PPACA”), including for Code section 4980H and the 90-day permissible waiting period. Although one approach might be to provide a single definition of “full-time employee” for purposes of Code section 4980H as well as automatic enrollment, we urge the IRS to adopt a rule that allows employers discretion to define the term “full-time employee” consistent with employment patterns and practices (given that employers themselves define the term in connection with administration of their benefits programs), so long as such definition is not inconsistent with Code section 4980H.

Determination of Full-Time Employee Status. We encourage the IRS to allow different methods of determining full-time or part-time status for different categories of employees. Large corporations may have hundreds, if not thousands, of employees across many divisions. Employers need to have flexibility to determine who constitutes a full-time employee.

MEASUREMENT/STABILITY PERIOD SAFE HARBOR

We are pleased that the Notice proposes implementation of a safe harbor that would include a measurement period and a stability period for purposes of determining an employee's status as a full-time employee ("Safe Harbor"). Given high rates of employee turnover and frequent variations in hours worked from month to month, requiring determination of full-time employee status on a month-to-month basis would add significant and unnecessary administrative complexity for many employers and lead to employee confusion regarding their health coverage.

We strongly support the flexibility that would be allowed by use of the Safe Harbor. The Safe Harbor would allow for ease of administration of health coverage and would enable employees to easily understand the parameters of their health coverage on an ongoing basis. It would also facilitate an employer's determination of its status as an applicable large employer and employees' status as full-time employees. We encourage the IRS to take into account the following suggestions as it moves to finalize the details of the Safe Harbor.

Permit at Least a 12-Month Measurement Period. We encourage the IRS to permit a measurement period of at least 12 months. This will achieve equitable results, as it will facilitate an employer's determination of full-time employees and also operate to smooth out significant variations in employee hours.

Application of Provisions to Seasonal Employees. We urge the IRS to issue guidance excluding all seasonal employees (*i.e.*, employees working less than 6 months per year), contract employees, daily employees, and temporary employees from the definition of full-time employee. This makes sense from an administrative perspective, given that a 12-month measurement period will frequently result in such employees not qualifying as full-time employees. If exclusion of all such employees is not possible, in the alternative, we request that, in determining whether an employee is a full-time employee or a part-time employee, "zero-hour" months during the measurement period be counted towards the ultimate calculation of employment status.

Permit Affirmative Classification and Opt-Out. We urge the IRS to permit employers, with respect to a given measurement period, to only test employees that are not hired specifically as full-time employees or part-time employees. For example, if an employee is hired to work 30 hours per week or more, the employer could be permitted to designate the employee as a full-time employee without actually undertaking any calculation for such employee. As another example, if an employee is hired to work less than 30 hours per week, the employee should be permitted to opt out permanently from any employer

health coverage and the employer thereafter could be permitted to treat the employee as a part-time employee going forward subject to changed circumstances.¹

Special Rule for New Employees. With respect to an employee who is not employed for the duration of the measurement period, we encourage the IRS to adopt a rule that would allow an employer to treat such employee as not a full-time employee for the duration of the look-back and stability period if he or she is employed for less than a specified minimum portion of the measurement period (*e.g.*, not employed for at least half of a stability period). The full-time status of such an employee during a subsequent stability period would be determined based on actual hours or an equivalency method.

In addition, we urge the IRS to allow employers, at their option, to either (i) use a uniform system whereby the measurement period for a new employee would begin on the first day of the month in which the employee is hired, or (ii) start the first measurement period for a new hire on his or her date of hire, although a uniform system should be adopted for all new hires. This would provide employers with important flexibility in administering health coverage with respect to new employees, resulting in more accurate recordkeeping and clearer communications to employees.

Use of 2013 Measurement Period Should Be Allowed. It is unclear based on the Notice whether a measurement period could begin in 2013 in order to aid employers in complying with Code section 4980H from the start (*i.e.*, January 1, 2014). If a measurement period cannot begin until 2014, employers will be placed in an administrative quandary of having to make initial determinations of full-time employee status on a month-to-month basis for at least part of 2014. As the IRS has acknowledged, month-to-month determinations are administratively burdensome and do not permit the employer or the employee the benefit of advance planning. Not allowing use of a measurement period prior to 2014 would get employers off on the wrong foot and would only serve to confuse employees. Employers should be able to determine in advance whether they will be considered applicable large employers effective as of January 1, 2014 for purposes of determining the amount of any assessable payments due and for arranging any required health coverage for full-time employees.

Discretion to Select Measurement and Stability Periods. We urge the IRS to allow employers discretion to select the measurement and stability periods that they wish to apply for purposes of determining full-time employees. In addition, we encourage the IRS to allow employers to change measurement periods and stability periods no less than annually. Such a rule is needed to ensure that employers have sufficient flexibility to address changing workforce demographics and administrative practices.

¹ Many part-time employees have health coverage from other sources. Allowing a part-time employee to opt out would greatly reduce administrative complexity and employee burden. Of course, such an employee could withdraw his or her decision to opt out.

Application of Different Measurement and Stability Periods to Different Categories of Employees. The Notice requests comments on whether there are circumstances in which it may be appropriate for the employer to apply different measurement and stability periods for different classifications of employees. We urge the IRS to enable employers to vary measurement and stability periods across categories of employees, *e.g.*, separate lines of business, so long as based on bona fide business reasons. This would better accommodate varying business needs and allow employee populations to stabilize following acquisitions or new business implementations.

ADMINISTRATIVE PERIOD

We appreciate that the IRS has acknowledged in the Notice that employers may need some reasonable administrative time following the measurement period to run tests based on data accumulated during the measurement period, notify employees of their eligibility, and enroll them in coverage. We therefore urge the IRS to allow employers adequate time in this regard. Given the significant administrative tasks attendant to determining eligibility, at least a 60-day administrative period commencing immediately after the measurement period concludes but before the stability period begins would provide employers with sufficient time to perform administrative duties related to coverage. A shorter period would place a burden on employers to hurry their determinations, which could create chaos in determining status as an applicable large employer and allowing employees to be notified of their eligibility for coverage.

COORDINATION WITH 90-DAY LIMIT ON WAITING PERIOD

The Notice invites comments on the interpretation of the 90-day limit on waiting periods for group health plans and health insurance issuers offering group health insurance coverage under PHSA section 2708 and how that section and Code section 4980H should be coordinated. It is our view that the 90-day limit should commence after the measurement period permitted under the Safe Harbor but must run concurrently with any administrative period described above. Such a rule would make sense, given that employee eligibility will not be determinable until after the close of the measurement period.

As with other issues described in this letter, we encourage the IRS to consider how to handle certain special situations. For example, we believe that the 90-day limit on waiting periods for part-time employees who become full-time employees should only begin at the time of the status change and coverage should become effective no later than the first day of the month following the end of the waiting period. As another example, employers who provide different health coverage to different categories of full-time employees (if permitted under final guidance) should be able to impose different waiting periods for such categories (*e.g.*, 30-day waiting period for one category and a 90-day waiting period for another category).

PENALTIES

We urge the IRS to consider how the penalty imposed under Code section 4980H(b) applies. It is our understanding of the statutory language that the penalty turns on the affordability of self-only coverage, rather than employee plus one or employee plus family. This is because the penalty appears to be based on whether a “full-time employee” of the applicable large employer has been certified as having enrolled in coverage through the exchange with respect to which an applicable premium tax credit or cost-sharing reduction is allowed or paid with respect to the employee. There is no mention of dependents in terms of determining penalty assessment. This aligns with current employer practices and goals of providing coverage to full-time employees (although in many cases employers do provide dependent coverage as well).

A related issue is with respect Code section 4980H(a) and whether the penalties associated therewith are based on an employer having to provide a qualifying level of coverage, *i.e.*, “minimum essential coverage”, to only the full-time employee, or also any dependents. The question arises because the express statutory language of Code section 4980H(a) refers to coverage for all “full-time employees” and then includes a reference to, “(and their dependents)”. While the Council agrees that the statutory language is not a model of legislative clarity and, as such, is open to multiple interpretations, we believe the best reading of the language is that an employer would not be liable for the penalty under Code section 4980H(a) so long as any full-time employee is offered either self-only coverage or coverage that includes “their dependents”. Accordingly, the Council is supportive of a rule that would allow employers to satisfy Code section 4980H(a) by making self-only coverage available to full-time employees, or by making coverage available which would include the full-time employee and their dependents.

We believe the above interpretation regarding Code section 4980H(a) is supported by both employer practice as well as common sense. The interpretation is consistent with current employer practices where employers who offer health coverage do so primarily on behalf of their employees (especially full-time employees). Although many employers do provide family coverage to full-time employees, many do not. Decisions by employers to provide dependent coverage are based not only cost issues for the employer, but also on other very important and practical considerations, *e.g.*, dependent coverage is less prevalent in high turnover and/or lower wage industries. Additionally, an alternative interpretation, which would require all “applicable large employers” to offer dependent coverage to full-time employees, could lead employers (especially in industries where many employers do not currently provide dependent coverage) to offer dependent coverage that is likely unaffordable to the full-time employee. This is not because the employer wants to make such coverage unaffordable; quite to the contrary. Rather, this is because the increased premiums subsidies that the employer would be required to pay in order to make the dependent coverage affordable are likely to be, in a great many instances, just too great for the employer to bear. Such a result is neither good policy, nor is it good for employee morale and relations. Moreover, as noted above, the statutory language with respect the “affordability” penalty under 4980H(b) appears to quite clearly

apply only with respect to self-only coverage offered to a full-time employee. Accordingly, it seems unlikely to us that Congress intended for employers to have to pay a penalty for purposes of Code section 4980H(a) unless they offer unaffordable dependent coverage to their full-time employees.

TIMING

Experience has shown time and again the value of issuing guidance in proposed form versus as an interim final rule. Most notably, doing so ensures broad public comment and well-reasoned rulemaking. Accordingly, we urge the IRS to issue any future rulemaking in proposed form. Additionally, it is imperative that employers have adequate time to implement any rulemaking in connection with Code section 4980H, as well as automatic enrollment and the 90-day waiting period. Accordingly, we strongly encourage the IRS to issue proposed regulations by fall 2011 and final regulations no later than January 1, 2012. We fully appreciate the challenge this poses to the IRS. Nonetheless, given the significant administrative steps employers will need to undertake to comply with any final rule, it is important that final rules be issued in time to allow employers to comply with the rule.

GENERAL COMMENTS

There are a number of other issues to which we think the IRS should pay particular attention in developing guidance. We may submit more detailed comments on these issues in the future but at present wish simply to draw your attention to the following issues where guidance will be needed:

Look-Back/Stability Periods.

- Given the irregular work schedule of employees who work part-time, whether an employer is required to provide coverage during the stability period if employee pay is insufficient to cover premiums.
- Identification of the opt-out period for employees who are automatically enrolled in health coverage, *i.e.*, if an employee does not opt out of coverage prior to the commencement of a stability period, whether they would be required to continue coverage for the duration of the stability period (other than in the case of termination).
- Interaction of an open enrollment period with a stability period.
- Application of the Safe Harbor in a situation in which a terminated employee is rehired within a 12-month period.
- Interaction of ongoing communication requirements (*e.g.*, distribution of summary plan descriptions) with extended eligibility periods under the Safe Harbor.

Determination of Full-Time Employee Status.

- Measurement of hours of service in a situation where a pay period overlaps months, where the employer uses existing payroll or related recordkeeping services to track hours of service on a payroll period basis.
- Whether an employer would ever be liable for more than one assessable payment in a given year with respect to a single employee who participates in more than one health plan of the employer.
- Where an employee qualifies for coverage as a full-time employee during a measurement period, but the employee requests or otherwise voluntarily restricts their availability to work to less than 130 hours per month during the stability period, whether an employer could decline to provide coverage.

Correction of Administrative Errors.

- Availability of correction of administrative errors in lieu of making assessable payments under Code section 4980H.

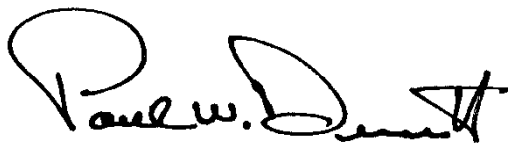
Clarification of COBRA Rights.

- The interaction of COBRA with the determination of full-time employee status under the Safe Harbor.

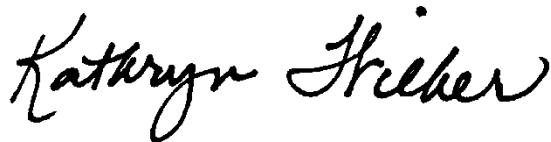
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We are pleased to have the opportunity to provide comments regarding shared responsibility for employers regarding health coverage under Code section 4980H, and we look forward to working with you on these important issues. If you have any questions or would like to discuss these comments further, please contact the undersigned at (202) 289-6700.

Sincerely,



Paul W. Dennett
Senior Vice President,
Health Care Reform



Kathryn Wilber
Senior Counsel,
Health Policy