



AMERICAN BENEFITS COUNCIL

October 29, 2019

Assistant General Counsel
Office of Chief Financial Officer
Office of Tax and Revenue
1101 4th Street, S.W.
Suite W750
Washington, D.C. 20024

Re: OTR NOTICE 2019-04: Guidance for Applicable Entities Pursuant to the Individual Taxpayer Health Insurance Responsibility Requirement Amendment Act of 2018

Dear Ms. Borges:

We are writing regarding the Individual Taxpayer Health Insurance Responsibility Requirement Amendment Act of 2018 (“DC Act”). Under the DC Act, beginning in 2019, most District taxpayers are required to maintain health coverage or pay a penalty on their tax return for the year.

The American Benefits Council (“Council”) is a Washington D.C.-based employee benefits public policy organization. The Council advocates for employers dedicated to the achievement of best-in-class solutions that protect and encourage the health and financial well-being of their workers, retirees and families. Council members include over 220 of the world's largest corporations and collectively either directly sponsor or administer health and retirement benefits for virtually all Americans covered by employer-sponsored plans. Many of the Council’s members employ residents of the District, and therefore are directly impacted by the DC Act for reasons discussed below.

We previously met with you on February 7, 2019, to discuss the DC Act and the related requirement that every “applicable entity that provides minimum essential coverage to an individual during a calendar year” submit an information return to the District of Columbia Office of Tax and Revenue (OTR). These information returns will

presumably be used by OTR to verify whether District taxpayers are maintaining appropriate coverage in compliance with the DC Act. On August 9, 2019, OTR released Notice 2019-04 (“the Notice”), which provided guidance to coverage providers regarding this reporting requirement. While we appreciate OTR’s efforts to assist coverage providers in understanding their reporting requirements by issuing the Notice, we believe the guidance needs improvements. We respectfully request the following changes which we hope OTR will consider incorporating into supplemental guidance. Our belief is that these changes will not only lessen the burden on the entities that have the obligation to report, but will facilitate OTR’s ability to administer the DC Act by ensuring that it is receiving the correct and relevant information needed to verify coverage.

SUGGESTION: MODIFY THE NOTICE TO CLARIFY THAT ONLY LARGE EMPLOYERS THAT OFFER SELF-INSURED COVERAGE ARE REQUIRED TO FILE INFORMATION RETURNS WITH OTR.

Q&A 3 of the Notice provides that “Employers or other sponsors of employment-based health plans, including governmental agencies, that covered at least fifty full-time employees, including at least one employee who was a District resident, during the applicable calendar year” must sign up and file information returns with OTR. Q&A 7 then suggests that these entities should file the same information returns they file with IRS, which for employers with 50 or more full-time employees would be forms 1094-C and 1095-C.¹

However, if an employer provides benefits through an *insured* arrangement, the Form 1095-C will *not* provide the information that OTR is seeking about whether or not the individual actually maintained coverage. This is because employers with 50 or more full-time employees (“ALE Members”) that provide benefits through an insured arrangement are not required to fill out Part III of Form 1095-C, which is the section of the Form 1095-C used for reporting the months of coverage. This is explained by the Internal Revenue Service in an FAQ posted on its website regarding Form 1095-C reporting, which is quoted in its entirety below.²

10. Which ALE members should complete Part III of Form 1095-C?

An ALE Member that sponsors a self-insured health plan should complete Part III of Form 1095-C for employees and family members who enroll in the self-insured coverage. An ALE Member that sponsors a health plan that includes self-insured options

1 As explained below in more detail, employers should not have to file Form 1094-C with OTR because the information contained on the Form 1094-C will have no relevance to OTR in enforcing the DC Act’s requirement.

2 The FAQ can be accessed at:

<https://www.irs.gov/affordable-care-act/employers/questions-and-answers-about-information-reporting-by-employers-on-form-1094-c-and-form-1095-c>

and insured options should complete Part III of Form 1095-C only for employees and family members who enroll in a self-insured option. An employer who participates in a multiple employer welfare arrangement (MEWA) is considered to offer that coverage to its employees, so if the employer participates in a self-insured MEWA, that employer would be required to complete Part III for its employees and family members who enroll in the MEWA. For information on how to complete Form 1095-C for an employee who is enrolled in self-insured coverage but who is not a full-time employee, see the Instructions for Forms 1094-C and 1095-C.

An ALE Member that offers coverage to an employee other than under its own self-insured health plan or a self-insured MEWA, such as through an employer-sponsored insured health plan or a multiemployer health plan, should NOT complete Part III. Instead, information about the coverage will be filed with the IRS and furnished to employees on Form 1095-B, Health Coverage, by the insurance provider or the sponsor of the plan providing the coverage.

[Emphasis added.]

This guidance is consistent with the federal regulations relating to minimum essential coverage reporting, which provide that health insurance issuers are responsible for reporting minimum essential coverage for *all* insured coverage, while plan sponsors are only responsible for minimum essential coverage reporting with regard to self-insured coverage. *See* Treas. Reg. 1.6055-1(c).

Therefore, requiring large employers with insured coverage to provide forms 1095-C to OTR creates a superfluous filing obligation, as OTR will receive coverage information about the DC employees of such employers from the insurance carrier that actually provides the health coverage (i.e., from the insurance carriers' forms 1095-B). In addition, requiring such large employers with insured coverage to provide forms 1095-C to OTR will cause additional unnecessary burdens on OTR, as your agency will have to store and maintain these forms even though they have no relevance to your mission in enforcing the health insurance responsibility requirement.

We respectfully suggest that you consider revising the first bullet of Q & A 3 to read as follows:

*Employers or other sponsors of **self-insured** employment-based health plans, including governmental agencies, that covered at least fifty full-time employees, including at least one employee who was a District resident, during the applicable calendar year;*

SUGGESTION: MODIFY THE NOTICE TO CLARIFY THAT REPORTING ENTITIES THAT FILE FORM 1094-C ONLY HAVE TO FILE PAGE 1 OF FORM 1094-C.

The "1094" Forms (1094-B and 1094-C) are transmittal forms that accompany the forms 1095-B and 1095-C when those forms are filed with the IRS. The Notice does not

explain why OTR needs the forms 1094-B and 1094-C from coverage providers (be they insurance carriers or employers), however. They do not contain any information that would assist OTR in verifying whether a particular District taxpayer is maintaining coverage in accordance with the DC Act.

Form 1094-B contains basic information about the coverage provider that is filing it (typically an insurance carrier) and lists the number of Forms 1095-B that are being filed with the IRS in connection with the transmittal. However, the information about the coverage provider is also on the Form 1095-B, and the total number of forms filed with IRS will not be of any use to OTR, because it will likely also reflect forms that the coverage provider filed with IRS for non-District residents. In other words, the number of forms the coverage provider files with IRS is unlikely to match the number of forms it files with OTR.

Similarly, Form 1094-C contains basic information about the employer, the employer's total employee count and full-time employee count on a monthly basis (again, not helpful to OTR because these counts will likely include non-District residents), information that the IRS uses to monitor whether the employer is satisfying the federal employer shared responsibility requirement, and information about the employer's controlled group under IRS rules (if any). However, there is no information on the Form 1094-C of which we are aware that would be useful to OTR in enforcing the DC Act.

We assume that OTR perhaps wants this information to confirm the filer's name, address, EIN, and point of contact (notwithstanding the fact that this information, other than the point of contact, is on the forms 1095-B and 1095-C that will be filed with OTR). If that is the case, we would request that OTR change the filing requirement so that employers that have to file a Form 1094-C only have to file the first page of the form (which is three pages in total).

There is no information on page two or three of the Form 1094-C which will have any relevance to OTR. Requiring employers to file the entire Form 1094-C would create an unnecessary filing burden, and again, would result in OTR receiving many documents that it will not use but will have to store and maintain. Therefore, unless OTR has a clearly articulated reason for how it would use the information on pages two and three of Form 1094-C to monitor whether District residents maintain coverage, we would respectfully suggest that OTR consider revising Q&A 7 to confirm that applicable entities only have to file the first page of Form 1094-C with OTR.

SUGGESTION: CONSIDER A ONE-YEAR TRANSITION RELIEF PERIOD WITH REGARD TO THE REPORTING REQUIREMENT.

The federal minimum essential coverage reporting requirement was originally supposed to go into effect with regard to coverage provided on or after January 1, 2014, (with the first filings due in 2015), but the IRS delayed mandatory reporting for one year under IRS Notice 2013-45.³ The stated purpose of the IRS transition relief was to “provide additional time for input from employers and other reporting entities in an effort to simplify information reporting consistent with effective implementation of the law” and “provide employers, insurers, and other providers of minimum essential coverage time to adapt their health coverage and reporting systems.” *Id.*

During our meeting earlier this year, we urged OTR to consider comparable transition relief. However, Q&A 15 indicates that for tax year ending December 31, 2019, the deadline is June 30, 2020. We respectfully request that OTR re-evaluate this deadline, and consider establishing a one-year transition relief period (perhaps with voluntary reporting for the 2019 tax year) for the same reasons that the IRS provided similar relief with regard to the first year of federal minimum essential coverage reporting.

While employers and other coverage providers now have experience navigating the federal reporting system, we have already heard from Council members with concerns about how they will adapt to the District’s reporting requirement. Employers have advised us that they do not currently have systems in place that will allow them to identify which forms 1095-C relate to “an individual [who] is an employee for whom wages were withheld and paid to the District for any period during the applicable calendar year,” as required by Q&A 5. Creating such systems likely will be burdensome and require considerable time to avoid erroneous reporting. Compounding the pressure on multi-state employers is the fact that similar reporting requirements are now becoming effective in multiple states (for example, New Jersey will also first require reporting in 2020, and California will require reporting in 2021), but not all of these obligations are identical. As a result, multi-state employers now have to modify their systems to ensure that they will accommodate all of the different state reporting requirements.

Accordingly, we request that OTR consider establishing a one-year transition period so that reporting will not be mandatory for the 2019 coverage period (i.e., no reporting would be required in 2020), with reporting becoming mandatory for coverage providers for 2020 (i.e., reporting would first be required in 2021).

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³ IRS Notice 2013-45 can be accessed at <https://www.irs.gov/pub/irs-drop/n-13-45.PDF>

Thank you for considering these comments. We would also like to request a follow-up meeting, or call, to further discuss these issues and the concerns of the employer community. After you have had an opportunity to review, please contact us at (202) 289-6700 with questions or comments.

Sincerely,

A handwritten signature in black ink, reading "Ilyse Schuman". The signature is written in a cursive, flowing style.

Ilyse Schuman
Senior Vice President, Health Policy