



AMERICAN BENEFITS
COUNCIL

June 28, 2010

The Honorable Phyllis Borzi
Assistant Secretary, Employee Benefits Security Administration
U.S. Department of Labor
Washington, D.C. 20210

The Honorable Michael F. Mundaca,
Assistant Secretary, Tax Policy
U.S. Department of Treasury
Washington, D.C. 20220

The Honorable Jay Angoff,
Director, Office of Consumer Information and Insurance Oversight
U.S. Department of Health and Human Services
Washington, D.C. 20201

Re: Definition of “Child” in Interim Final Rules for Group Health Plans and Health Insurance Issuers Relating to Dependent Coverage of Children to Age 26

Dear Ms. Borzi, Mr. Mundaca and Mr. Angoff:

I am writing on behalf of the American Benefits Council (“Council”) to request additional guidance in connection with the meaning of “child” in the Interim Final Rules for Group Health Plans and Health Insurance Issuers Relating to Dependent Coverage of Children to Age 26 under the Patient Protection and Affordable Care Act (“PPACA”) (the “Interim Final Rules”). 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 urge the agencies to issue guidance providing an express definition of “child” for purposes of the Interim Final Rules and applying new section 2714 of the Public Health Service Act (“PHSA”) (as added by PPACA), which requires that a plan or issuer that makes available dependent coverage of children must make such coverage available for

children until attainment of age 26 (the “Adult Child Requirement”). Specifically, we request guidance clarifying that the terms “child” and “children” as used in new PHS section 2714 and the Interim Final Rules have the same meaning as the term “child” in section 152(f)(1) of the Internal Revenue Code of 1986, as amended (“Code”).

Background

The Adult Child Requirement is set forth in New PHS section 2714, as added by the PPACA. The provision is generally effective for plan years beginning on or after September 23, 2010 (*i.e.*, the 2011 plan year for calendar year plans) and includes a special transition rule for “grandfathered” plans.

The Health Care and Education Reconciliation Act of 2010 (“HCERA”), which was enacted in conjunction with the PPACA, makes a corresponding change to the Code. Specifically, it amends Code section 105(b) to make excludable from an employee’s income any employer-paid health coverage attributable to the employee’s child to the extent such child does not turn age 27 during the taxable year at issue.

Internal Revenue Service (“IRS”) Notice 2010-38 addresses the tax treatment of employer-provided health coverage attributable to children who do not turn age 27 during a given taxable year. The Notice defines “child” to be a child within the meaning of Code section 152(f)(1) who has not attained age 27 by the end of a given taxable year. Code section 152(f)(1) in turn defines “child” to mean “an individual who is . . . a son [including a legally adopted individual], daughter [including a legally adopted individual], stepson, or stepdaughter of the taxpayer, or . . . an eligible foster child of the taxpayer.” Other children, *e.g.*, grandchildren and custodial children, are not included in the definition. As discussed below, the Notice correctly gives full effect to congressional intent by defining “child” for purposes of the Notice to mean that as defined in Code section 152(f)(1).

The Interim Final Rules, which followed upon the heels of IRS Notice 2010-38, were issued in response to express language in new PHS section 2714 mandating that regulations be issued defining “the dependents to which coverage shall be made available” under the Adult Child Requirement. The Interim Final Rules generally require that all group health plans and issuers that currently provide dependent child coverage to “make such coverage available for children until attainment of 26 years of age.” Significantly, neither “child” nor “children” is defined in the Interim Final Rules.

A Code Section 152(f)(1) Definition of “Child” Is Necessary to Ensure Compliance and Ensure that Certain Children Do Not Lose Access to Essential Health Coverage

We urge the departments of Labor, Treasury and Health and Human Services to issue clarifying guidance defining “child” for purposes of the Adult Child Requirement, specifically, by reference to Code section 152(f)(1). Adoption of such a definition will

facilitate compliance with the rule by plans and issuers. Moreover, absent such a definition, there is a very real likelihood that plans and issuers will cease providing coverage to certain classes of children, including custodial children (*i.e.*, children for whom the employee is not the legal parent but otherwise operates as the custodian, such as nieces and nephews or other minor-age individuals) and grandchildren living in the home of the employee.

Although the Interim Final Rules do not provide a *per se* definition of “child”, they do make clear that plans and issuers cannot place restrictions on eligibility except based on the relationship between an employee and a child. The absence of an express definition of “child”, however, has left many plan sponsors concerned that they must provide coverage to all children of a specified relationship (such as grandchildren, nieces, nephews) and cannot impose any limitations regarding eligibility (*e.g.*, that the child share the same house as the employee participant or receive more than half of his or her financial support from the employee participant), even where the child would not otherwise qualify under the definition set forth in Code section 152(f)(1).

For example, in addition to making coverage available to all children that meet the Code section 152(f)(1) definition of “child”, many plan sponsors also make coverage available to an employee’s custodial children and/or grandchildren living in the home. (*E.g.*, many plans make coverage available to an employee’s nieces or nephews or other minor age individuals who live with the employee and receive at least some specified amount of financial support from the employee, or with respect to grandchildren living with the employee).

Absent an express definition by reference to Code section 152(f)(1), plans that currently provide for the types of coverage discussed above could face potential liability under new PHSa section 2714 in the event they choose to continue with the status quo. This is because the plan could be viewed as impermissibly imposing a dependency or other eligibility test on a class of “children”, in violation of the Adult Child Requirement. To avoid this result, plans must choose to either (i) provide coverage to all children of a specified relationship (such as nieces, nephews, or grandchildren), without regard to any dependency tests or other eligibility requirements, or (ii) cease providing such coverage, and, in doing so, deny access to essential health coverage for children that they likely do not have access to such coverage elsewhere.

Faced with these two options, plans and issuers undoubtedly would like to avoid having to choose the latter option; after all, they have chosen until now to voluntarily expand their class of beneficiaries to include certain classes of children beyond those within the meaning of Code section 152(f)(1). Nonetheless, it is unlikely, especially given the current economic climate, that employers can afford and/or are willing to make available coverage to non-Code section 152(f)(1) children without regard to any dependency tests or other eligibility requirements. Thus, it is likely that many plan sponsors will choose to eliminate coverage for children other than those that meet the

Code section 152(f)(1) definition. Such a result would be contrary to congressional intent, which was to expand coverage to Code section 152(f)(1) children, not to contract the availability of coverage to other groups of deserving individuals (including, quite possibly, minor age children).

Congressional Intent Clearly Demonstrates that “Child” Should Be Defined for Purposes of the Interim Final Rules to Be Based on the Code Section 152(f)(1) Definition

Legislative history indicates that Congress clearly intended for “child” to be defined in reference to Code section 152(f)(1). When Congress passed PPACA on December 24, 2009, it did not include a corresponding change to the Code to address the taxation of such coverage. Without such a change, employer-provided coverage to nondependent adult children would continue to be taxable as wages to the parent employee.

Congress realized this oversight and, as part of its consideration of HCERA, added section 1004(d), which amends Code section 105(b) to make excludable from an employee’s income any employer-paid health coverage attributable to the employee’s child to the extent such child does not turn age 27 during the taxable year at issue. Congress also made sure to include an express definition of “child” by reference to existing Code section 152(f)(1). Given the “hand-in-hand” nature of HCERA section 1004(d) and new PHSa section 2714, it is clear that Congress intended that the same definition of “child” apply for both new PHSa section 2714 and its corresponding tax “fix” included as part of HCERA section 1104(d).

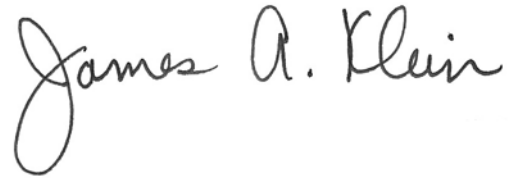
In light of the foregoing, adopting a Code section 152(f)(1) definition of “child” for purposes of the Adult Child Requirement – as used in HCERA section 1004(d) and corresponding IRS Notice 2010-38 – would fulfill congressional intent, because it would mean that plans and issuers that already provide coverage to minor age Code section 152(f)(1) children would be required to provide coverage to such children up to age 26, without regard to any dependency or other eligibility tests. Plans and issuers, however, would be free to continue to provide coverage to an expanded class of beneficiaries that includes dependent grandchildren and custodial children, among others, in accordance with applicable plan/policy terms.

Conclusion

In the absence of clarifying guidance, many employers are likely to opt out of providing coverage to employees’ grandchildren or custodial children altogether. Such a result would be contrary to congressional intent and result in numerous children losing access to essential health coverage. Accordingly, we urge the agencies to issue guidance that makes clear that “child” for purposes of the Adult Child Requirement means a “child” as defined under Code section 152(f)(1).

We would be pleased to respond to any questions you may have regarding our comments with respect to the definition of "child" for purposes of the Adult Child Requirement. Thank you for your consideration of our views on this important issue.

Sincerely,

A handwritten signature in black ink that reads "James A. Klein". The signature is written in a cursive style with a large, looping initial "J".

James A. Klein
President