



AMERICAN BENEFITS
COUNCIL

May 21, 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

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

I am writing on behalf of the American Benefits Council to share our views on the applicability of plan requirements included in the Patient Protection and Affordable Care Act of 2010 (PPACA), as amended, to retiree-only plans.

The American Benefits Council represents primarily large employers and other organizations that collectively either sponsor or administer health and retirement benefits covering over 100 million Americans.

Since the enactment of the Health Insurance Portability and Accountability Act (HIPAA), sponsors of health plans that include only retirees (and their spouses and qualified dependents) have relied on a parallel provision in the Public Health Services Act (PHSA), the Internal Revenue Code (the Code), and ERISA as the basis for concluding that certain plan requirements added by HIPAA do not apply to these plans. The provision is an exemption for plans with fewer than two participants who are current employees. The interpretation that this provision exempts retiree-only plans

from certain provisions added by HIPAA has also been confirmed informally by the Department of Labor.

Employers have relied on this interpretation of the “less than two current employees” rule when they sponsor health benefit plans solely for retirees and it has been an important provision in helping to maintain these plans without imposing additional costs that would be borne by both retirees and employer plan sponsors.

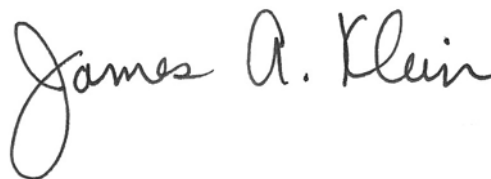
PPACA eliminates the “less than two current employees” rule for the purposes of the PHSA, but not for ERISA or the Code. Our understanding is that the rule (Section 2721(a) of the PHSA) was eliminated in order to apply PPACA’s insurance reform provisions and the health benefits exchanges to very small employers with fewer than two employees and that the elimination of this provision by PPACA was not intended to apply the new plan requirements included in the legislation to retiree-only plans or to remove their current exemption from certain provisions added by HIPAA to the PHSA, the Code or ERISA.

We have included an analysis of this issue for your consideration and recommend that this important issue be clarified in future guidance by the agencies so that employers can continue to rely on the interpretation that certain provisions of current law and PPACA are not intended to apply to retiree-only plans. We believe that it is important for future guidance on PPACA to clarify this issue because the elimination of the “less than two current employee rule” for the purpose of the PHSA has created uncertainty around this issue for retiree-only plans.

We would be pleased to respond to any questions you may have regarding either of the options discussed in the analysis to address the issue of the applicability of certain provisions in PPACA to retiree-only plans.

Thank you for your consideration of our views on this important issue to employers and retirees.

Sincerely,

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

James A. Klein
President