The ERISA Industry Committee

"Shared Responsibility for Employers Regarding Health Coverage"

Testimony of Alden J. Bianchi
Member of Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C.

on behalf of The ERISA Industry Committee

Before the Department of the Treasury and the Internal Revenue Service

Tuesday, April 23, 2013
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Advocating the Employee Benefit and Compensation Interests of America's Major Employers

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INTRODUCTION

Good afternoon. My name is Alden Bianchi. I am member in the law firm of Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C., and I appear before you today on behalf of the ERISA Industry Committee—also known and referred to as "ERIC". ERIC is a nonprofit association committed to the advancement of the employee retirement, health, and other welfare benefits of America's largest employers. ERIC's members sponsor some of the largest private group health plans in the country. These plans provide health care to millions of workers and their families.

ERIC appreciates the opportunity to testify before you and share our concerns about the proposed regulations that implement the employer shared responsibility provisions of the Affordable Care Act. Perhaps more than any other feature of the Affordable Care Act, the employer shared responsibility rules pose vexing, and potentially costly, challenges to "applicable large employers" as they endeavor to comply. For ERIC's members, few if any rulemaking projects under the Act are more important or critical. We therefore appreciate the opportunity to elaborate on the views expressed in our comment letter of March 18.

ERIC'S CONCERNS AND RECOMMENDATIONS

1. *Employers should be allowed to use different methodologies for full-time/part-time and variable hour employees.*

First and foremost, ERIC encourages the agencies to clarify the methodologies available to employers for counting an employee's hours of service. It is absolutely essential - and let me repeat that - it is absolutely essential that employers be permitted to use one methodology to count hours for those who are clearly either full-time or part-time employees on the date of hire, and to use a different methodology (such as the lookback safe harbor) to count hours for so-called variable hour employees.

2. Counting hours of service across controlled group members should not be required.

We are also concerned that, under the proposed regulations, an employer must aggregate all hours worked by an employee across all members of the controlled group. This is not an insignificant task under any circumstance.

Section 49890H requires related employers to be aggregated only for two specific purposes: to determine whether an employer is an "applicable large employer," and to apply the 30-employee exclusion. Other than this, no statutory employer aggregation rule applies for purposes of determining whether an individual is a full-time employee.

The proposed regulations, however, provide that "hours of service" are combined across all members of a controlled group. As a consequence, an employee who works part-time for multiple members of a controlled group could be considered a full-time employee for purposes of assessing liability under Internal Revenue Code section 4980H.

Large employers often transfer employees between subsidiaries, or between a parent company and a subsidiary, during the year. In addition, employees sometimes work part-time simultaneously for two different employers within the same controlled group. Each entity often maintains its own payroll system and employment records. Accordingly, it is very difficult for an employer to identify which employees work for a related employer, let alone to determine how many hours of service the employee has recorded with the related employer. The proposed regulations thus would require companies to create complex and costly systems to extract, compile, assimilate, and communicate information on a monthly basis across multitudes of different entities.

ERIC urges that the final regulations provide that an employee's hours of service be computed separately for each employer in the controlled group, and that the employee's status as a full-time employee of a given employer be based solely on the employee's hours of service with that employer.

If the final regulations do not adopt this approach, then it is essential that the rules take the position that no more than one applicable large employer within one controlled group would be subject to a penalty for a failure to cover the same employee, and, similarly, that an offer of coverage by one applicable large employer would relieve all other members of that controlled group from liability.

3. *The rules regarding dependents should be changed.*

Although I will not delve into the topic today, ERIC's written comment letter urges the agencies not to require coverage of dependents. If the agencies continue to require coverage of dependents, however, we strongly recommend that you narrow the definition of "dependent" to exclude an employee's foster child and any other individual that is not eligible to be claimed as a dependent on the employee's federal tax return (although accommodating, of course, the coverage of adult children to age 26) as many plans do not cover all of the categories of dependents identified in the regulation. Finally, we also encourage the agencies to expand the transition rule for covering dependents to apply to plans that cover some, but not all, children as well as those that do not cover children at all.

4. *The maximum length of administrative periods should be 3 months, and not 90 days.*

We also encourage the agencies to extend the length of the permissible administrative period under the proposed regulations to three months instead of 90 days.

Use of a 90-day, rather than a three-month period, presents a significant problem in this context, as it does in the context of the 90-day waiting period rule. As many calendar months consist of 31 days rather than 30 days, many administrative periods under this structure would be forced to conclude before the end of the calendar month. This is true, for instance, in the last quarter of a calendar year (which would normally be used as the administrative period for many, many plans); if plans were forced to use a 90-day administrative period, the period would end on December 29, rather than the much more desirable December 31. Forcing plans to adjust for mid-month entries or making other changes to accommodate a 90-day period does nothing but increase plan costs and administrative complexity while providing no offsetting benefit to plan participants.

5. *Amounts paid by employers to service contract employees for benefits should count for purposes of affordability.*

We are also concerned about the interaction of the McNamara-O'Hara Service Contract Act of 1965 (known as the "SCA") and the shared responsibility rules. The SCA applies to certain contracts between companies and the United States or the District of Columbia. Contractors and subcontractors performing on these federal contracts must provide their service contract employees with fringe benefits or cash equivalent payments in lieu of fringe benefits unless a specific exemption applies.

Effective June 17, 2012, the prevailing health and welfare fringe benefits issued under the SCA are $3.71 per hour (or $643.07 per month).

The Act and the proposed regulations under the shared responsibility provisions are silent as to how an employer may treat this SCA-mandated fringe benefit payment when determining whether coverage is affordable.

ERIC believes that employers should not be put in the unfair and untenable position of paying twice for the cost of health care coverage for their service contract employees: once under the fringe benefit payment provisions of the SCA, and again if the 4980H penalty applies because the worker decides not to use the funds to pay for employer-provided health coverage. We therefore recommend that employers that comply with the SCA should be deemed to have offered "affordable" health care coverage to these employees for the periods covered by the SCA determinations.

CONCLUSION

In conclusion, I appreciate the opportunity to appear before you today on ERIC's behalf, and I look forward to responding to any questions that you may have relating to the items covered in my testimony.

Thank you.