



The
ERISA
Industry
Committee

October 31, 2011

Submitted by e-mail:
Notice.comments@irscounsel.treas.gov

CC:PA:LPD:PR (Notice 2011-73)
Room 5203
Internal Revenue Service
P.O. Box 7604
Ben Franklin Station
Washington, DC 20044

Attention: Notice 2011-73 Request for Comments on Health Coverage Affordability
Safe Harbor for Employers (Section 4980H)

Ladies and Gentlemen:

The ERISA Industry Committee (“ERIC”) is pleased to respond to the request of the Internal Revenue Service and Treasury Department (collectively, the “Agencies”) for comments regarding a proposed safe harbor for determining the affordability of employer-sponsored coverage for purposes of the shared responsibility provisions of the Patient Protection and Affordable Care Act (“ACA”).

ERIC’s Interest in the Proposed Safe Harbor

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 many of the largest private group health plans in the country. These plans provide health care to tens of millions of workers and their families.

ERIC’s members are committed to, and known for, providing high quality, affordable health care. Employers do not have unlimited resources to spend on health care, however. ACA has imposed a number of expensive new mandates on employer health plans, and has significantly increased the administrative burden and costs of operating these plans. Accordingly, ERIC’s members have a vital interest in ensuring that the shared responsibility provisions do not impose unnecessary costs and administrative burdens on large employers.

Large employers are subject to the shared responsibility penalty if they either (1) do not offer health coverage to full time employees (and their dependents) and at least one full-time employee enrolls in a qualified health plan through an exchange and is eligible for a premium tax credit or cost-sharing reduction; or (2) offer coverage to their full-time employees (and their dependents) that is either considered *unaffordable* or fails to provide minimum value, and one or more full-time employees enrolls in a qualified health plan through an exchange and is eligible for a premium tax credit or cost-sharing reduction.

An employer's coverage is unaffordable if the employee's required contribution for the lowest-cost, single-only option exceeds 9.5 percent of the employee's household income. Because household income takes into account amounts that are generally not known to employers (such as spousal or child support payments), the Agencies are proposing to provide a safe harbor whereby affordability of an employer's coverage would be measured by reference to the wages reported for an employee in Box 1 of Form W-2.

ERIC appreciates the Agencies' willingness to provide a safe harbor to allow employers to assess whether the coverage they are offering is affordable to their employees. ERIC urges, however, that the utility of the safe harbor be improved by permitting employers to determine prospectively whether they will meet the safe harbor in a given year.

Comments on Proposed Safe Harbor

Notice 2011-73 proposes that an employer determine whether it has met the safe harbor with respect to an employee after the end of a calendar year. For example, an employer would determine whether it met the safe harbor for 2014 with respect to an employee by looking at that employee's W-2 wages for 2014 and comparing 9.5 percent of that amount to the employee's 2014 employee contribution. The Notice provides that the purpose of the safe harbor is to give employers an opportunity to ascertain whether they are offering affordable coverage to their employees in order to avoid the shared responsibility penalty. The safe harbor should also provide employers certainty regarding whether they will satisfy the safe harbor in advance of the calendar year to which the coverage relates.

Employers should be permitted to satisfy the safe harbor prospectively by using a reasonable projection of an employee's current wages to set the employee's contributions for the following year at a level that would meet the affordability requirements. This methodology is analogous to the methodology that the Department of Health and Human Services and the Agencies have proposed for exchanges to determine whether an individual's household income meets the eligibility requirements for premium tax credits, including whether an individual's employer-sponsored coverage is affordable.

Under the Department's proposal, exchanges will project an individual's household income for the plan year using household income reported on the applicant's most recently filed tax return.¹ If the exchange determines that the individual's coverage is unaffordable using this projected amount, the individual remains eligible for premium tax credits for the entire plan year even if the coverage would actually be affordable.² Under ERIC's recommended version of the safe harbor for employers, an employer would use the same methodology as the exchanges for determining whether coverage is affordable by substituting the most recently reported W-2 wages for household income.

¹ Proposed 45 C.F.R. § 155.320(c)(3)(ii).

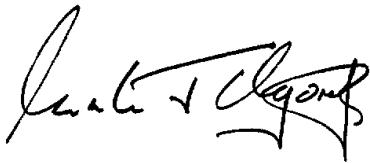
² 76 *Fed. Reg.* 50,931, 50,935 (Aug. 17, 2011).

For example, suppose an employer's open enrollment period for 2014 benefits occurs in November 2013. The most recently reported W-2 wages are the 2012 wages reported on Forms W-2 filed at the beginning of 2013. Suppose an employee's W-2 wages for 2012 are \$50,000 and the employer uses these wages to determine, using reasonable assumptions, that the employee's W-2 wages for 2014 will be \$51,000. The employer should be considered to have satisfied the safe harbor if the employee's contribution for self-only coverage for 2014 does not exceed \$4,845 (9.5 percent of \$51,000), even if the employee actually earns only \$50,750 in W-2 wages during 2014. Appropriate adjustments would need to be made for new hires or employees who otherwise changed their employment status during a year.

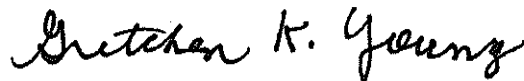
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ERIC appreciates the opportunity to provide comments on the proposed rules establishing a process for exchanges to verify whether an individual is eligible for premium tax credits or cost-sharing assistance. We expect that we will have additional comments on the safe harbor and related guidance on the shared-responsibility penalty provisions when the Agencies issue proposed rules on the provisions. If the Agencies have any questions concerning our comments, or if we can be of further assistance, please let us know.

Sincerely,



President & CEO



Gretchen K. Young
Senior Vice President, Health Policy