



THE
ERISA
INDUSTRY
COMMITTEE

August 27, 2012

Jeanne M. Lambrew
Deputy Assistant to the President for Health Policy
Eisenhower Executive Office Building
Room 225
1650 Pennsylvania Avenue, N.W.
Washington, DC 20506

Re: No Employer Shared Responsibility for Dependent Coverage

Dear Ms. Lambrew:

We are writing on behalf of the ERISA Industry Committee ("ERIC") to express ERIC's strong support for interpretive guidance clarifying that employers are not required to offer dependent coverage in order to meet their shared responsibility obligations under the Patient Protection and Affordable Care Act ("ACA"). This interpretation reflects the way in which the employer shared responsibility provisions are designed to operate. We urge the President to support this interpretation.

ERIC is concerned that the executive branch agencies might interpret ACA to require employers to offer dependent coverage, regardless of whether the dependent coverage is affordable or sufficiently valuable. This interpretation is not consistent with the statute as a whole, and it would have significant negative effects on the nation's large employers without producing a meaningful increase in dependent coverage.

ERIC's Interest in the Shared Responsibility Requirements

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 tens of millions of workers and their families.

ERIC's members are committed to, and known for, providing high quality, affordable health care. Most of ERIC's members voluntarily provide health coverage to their employees' family members as well as to the employees themselves. In some industries, however, it is not practicable for an employer to provide family coverage.

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The ERISA Industry Committee is a non-profit association committed to the advancement of the employee retirement, health care coverage, and welfare benefit plans of America's major employers.

Employers do not have unlimited resources to spend on health care. ACA has imposed a number of expensive new mandates on employer health plans that were already struggling to cope with ever-increasing medical costs. For an employer that does not currently offer family coverage, the cost of extending group health coverage to dependents would be substantial. Even if the employer required its employees to pay the full cost of covering their dependents, the employer would incur significant administrative costs and burdens just by offering the coverage. In order to remain competitive, the employer would be required to reduce other benefit costs or cut jobs. Accordingly, ERIC's members have a vital interest in ensuring that the shared responsibility provisions do not impose expensive and unnecessary administrative burdens on large employers and do not limit employers' flexibility to design cost-effective health benefits that meet the needs of their workers.

Summary of Comments

Although the shared responsibility provisions refer to health coverage for full-time employees and their dependents, the penalties are based solely on the number of an employer's full-time employees: dependents do not enter into the penalty calculation. An employer that offers affordable health coverage to all of its full-time employees is not subject to any shared responsibility penalty, regardless of whether the employer offers dependent coverage. If Congress had intended to create a dramatic new mandate that penalized employers for failing to offer dependent coverage, Congress would have done so much more directly (and more effectively) than the statute achieves with its parenthetical reference to dependents. ERIC believes that the reference to dependents in the shared responsibility provisions is merely a drafting error, one that should be corrected in agency guidance.

Some commenters have suggested that the statute should be interpreted to require employers to offer dependent coverage on an employee-pay-all basis. However, a mandate to offer unsubsidized dependent coverage would impose substantial burdens and costs on the employer without increasing the dependents' access to affordable health coverage. In fact, an employer might do its low-income employees a disservice by offering unsubsidized dependent coverage, since the availability of the coverage might make the employee ineligible for premium tax credits and other financial assistance with respect to the dependent.

We urge the President to support regulations clarifying that the shared responsibility provisions do not require employers to offer dependent coverage and do not penalize employers that decline to offer this coverage.

Statutory Analysis

ACA added section 4980H to the Internal Revenue Code (the “Code”). Under section 4980H, large employers are subject to one of two penalties if any full-time employee is certified to receive a premium tax credit or cost-sharing reduction:

- Section 4980H(a) Liability: If an applicable large employer fails to offer its full-time employees (and their dependents) the opportunity to enroll in minimum essential coverage, the employer must pay an excise tax equal to 1/12 of \$2,000 per month times the number of its full-time employees in excess of 30.
- Section 4980H(b) Liability: If an applicable large employer offers minimum essential coverage to its full-time employees (and their dependents), but the coverage is not affordable or not sufficiently valuable, the employer must pay an excise tax equal to 1/12 of \$3,000 per month times the number of its full-time employees who receive a premium tax credit or cost-sharing reduction. This excise tax is capped so that it does not exceed the section 4980H(a) liability that would have applied if the employer did not offer coverage.

Although both provisions refer to an employee’s dependents, the penalties are based on employee coverage, not dependent coverage. Under both section 4980H(a) and section 4980H(b), the penalty formula takes into account only the number of full-time employees who lack the requisite coverage: the number of dependents who lack coverage is irrelevant. In addition, as long as an employer offers affordable coverage to all of its full-time employees, the employer is not subject to the shared responsibility penalty, regardless of whether the employer offers dependent coverage.¹

1. No penalty applies as long as an employer offers affordable health coverage to its full-time employees.

The shared responsibility penalties under section 4980H(a) and section 4980H(b) apply only if at least one full-time employee of the employer enrolls in another health plan, and financial assistance in the form of a premium tax credit or cost-sharing reduction is allowed or paid *with respect to the employee*.² If

¹ Under one interpretation of the statute, an employer that does not offer minimum essential coverage to *all* full-time employees might become subject to the section 4980H(a) penalty with respect to its failure to offer dependent coverage. We explain below in part 4 why this interpretation is incorrect.

² I.R.C. § 4980H(a)(2), (b)(1)(B), & (c)(3).

the employee is eligible to enroll in employer group health coverage that is affordable and sufficiently valuable, the employee will not be eligible for a premium tax credit or cost-sharing reduction.³ Accordingly, as long as the employer offers affordable health coverage to each full-time employee who would qualify for a premium tax credit based on income level,⁴ no full-time employee will be eligible for financial assistance, and the employer cannot be liable for a shared responsibility penalty.

2. Affordable health coverage does not include dependent coverage.

A low-income employee who is eligible for coverage under an employer's group health plan will be ineligible for a premium tax credit if the employer coverage meets two requirements: it must be affordable, and it must provide minimum value. Coverage under an employer's group health plan is affordable if the employee's required contribution to the plan does not exceed 9.5% of the employee's household income. The "required contribution" is the portion of the annual premium that the employee would pay *for self-only coverage*.⁵ Accordingly, an employer group health plan that offers coverage only to employees (not to their family members) will be affordable if the employees' contributions for self-only coverage do not exceed 9.5% of the employees' household income.

An employer's group health plan provides minimum value if the plan covers at least 60% of the total allowed costs of benefits provided under the plan.⁶ Final regulations issued by the Treasury Department confirm that minimum value is based on the total allowed costs of benefits provided *to the employee* under the plan.⁷ Accordingly, a plan that offers health coverage only to employees (not to their family members) and covers at least 60% of the cost of the employees' benefits will provide minimum value.

³ I.R.C. § 36B(c)(2) (an individual is not eligible for a premium tax credit in any month during which he is eligible for minimum essential coverage, including affordable coverage under an employer group health plan); ACA 1402(f)(2) (an individual is not eligible for a cost-sharing reduction in any month during which he is not eligible for a premium tax credit).

⁴ An individual is eligible for the premium tax credit if his household income is between 100% and 400% of the federal poverty line. See I.R.C. § 36B(c)(1)(A).

⁵ I.R.C. § 36B(c)(2)(C)(i); I.R.C. § 5000A(e)(1)(B)(i); see also IRS Notice 2011-73 (creating an affordability safe harbor based on the employee portion of the self-only premium).

⁶ I.R.C. § 36B(c)(2)(C)(ii).

⁷ Treas. Reg. § 1.36B-2(c)(3)(vi).

As long as an employer's group health plan offers affordable coverage providing minimum value to each full-time employee, the employees will not be eligible for a premium tax credit even if the group health plan provides no dependent coverage at all. Because no full-time employee will be eligible for a premium tax credit or cost-sharing reduction, the shared responsibility penalty will not apply.

3. A dependent's eligibility for financial assistance does not trigger a shared responsibility penalty.

If an employee's dependents are not eligible for coverage under the employer's group health plan, the employee will be able to receive a premium tax credit with respect to the dependents (assuming that they meet the household-income requirement and are not eligible for minimum essential coverage from another source). The shared responsibility penalties under section 4980H(a) and section 4980H(b) are not triggered when an employee receives a premium tax credit or other financial assistance with respect to a dependent, however. Instead, the shared responsibility penalties apply only when a premium tax credit or cost-sharing reduction is paid *with respect to at least one full-time employee* of the employer.⁸

4. The shared responsibility penalty should not apply if the employer offers minimum essential coverage to substantially all full-time employees, but not to their dependents.

As we have explained, an employer will not be subject to a shared responsibility penalty as long as the employer offers affordable health coverage to *all* of its full-time employees, even if the employer does not offer coverage to dependents. The penalty structure demonstrates that section 4980H is not designed to mandate dependent coverage, or to penalize employers for failing to provide the coverage.

As a practical matter, however, it is very difficult for a large employer to ensure that it covers every full-time employee, even if the employer provides comprehensive, affordable health coverage to a very high percentage of its full-time work force. For example, a large manufacturing business might own a few small retail outlets that cannot afford to offer group health coverage to the few individuals they employ. Section 4980H(a) appears to provide that if even one full-time employee seeks health coverage through an exchange and receives a premium tax credit or cost-sharing reduction, the employer will incur a penalty

⁸ I.R.C. § 4980H(a)(2), (b)(1)(B).

of \$2,000 times the number of its full-time employees—including the large majority of employees who have minimum essential coverage.

The Internal Revenue Service has recognized that this result is unreasonable and manifestly unfair. The Service has proposed that the section 4980H(a) penalty will not apply as long as an employer covers substantially all of its full-time employees, even if a few full-time employees do not have minimum essential coverage.⁹ ERIC strongly supports this interpretation. We are concerned, however, that the “substantially all” safe harbor might apply only to employee coverage, so that an employer that satisfies the “substantially all” test with respect to its full-time employees might still be subject to the section 4980H(a) penalty if the employer fails to offer dependent coverage.

If section 4980H(a) is interpreted in this way, it will increase the administrative burden and expense that large employers must bear without increasing the number of dependents who have affordable health coverage. An employer may avoid the section 4980H(a) penalty by offering minimum coverage to dependents on an employee-pay-all basis, even though the dependent coverage might not be affordable for low-income employees.

As we have explained, there is no penalty under section 4980H(b) for failing to offer affordable coverage to dependents. The penalty under section 4980H(b) is based on the number of full-time employees who lack affordable coverage: the penalty is the same regardless of whether the employer offers dependent coverage.

As we explain in the next section, a rule requiring employers to offer unaffordable dependent coverage not only imposes an unnecessary administrative burden on employers, it actually harms the low-income employees whom the shared responsibility provisions were designed to help.

5. An employer that offers unsubsidized dependent coverage might make dependents ineligible for financial assistance.

If an employer offers dependent coverage under a group health plan, but does not subsidize the cost of the coverage, the mere fact that the coverage is available might make the employee’s dependents ineligible for the premium tax credit. This is so because coverage under an employer group health plan is affordable with respect to dependents as long as the employee’s required contribution does not exceed 9.5% of household income; and, as explained above, the “re-

⁹ See IRS Notice 2011-36.

quired contribution” is based on the cost of the employee’s self-only coverage, without regard to any additional cost associated with dependent coverage.¹⁰

The Treasury Department adopted this position in the proposed regulation interpreting the premium tax credit.¹¹ The Treasury Department explained in the preamble of the proposed regulation that both the statutory language and the legislative history appeared to require that affordability be determined with respect to an employee’s spouse and dependents by reference to the cost of the employee’s self-only coverage, even if the cost of family coverage exceeded 9.5% of household income.¹² In the final regulation, the Treasury Department reserved for further consideration the question whether affordability for the employee’s dependents could be based on the cost of family coverage.¹³ Until this issue is resolved, however, it appears that an employer’s decision to offer unsubsidized dependent coverage will harm the employee by making his dependents ineligible for the premium tax credit.

Even if the Treasury Department ultimately determines that the affordability of coverage for a dependent should be based on the cost of family coverage, however, this determination will not change the employer’s obligation under the shared responsibility provision. Although a dependent might become eligible for the premium tax credit if the employer offered dependent coverage that was unaffordable, the financial assistance provided to the dependent would not trigger an employer penalty under Code section 4980H.

6. The reference to dependent coverage in section 4980H is an error.

Congress followed an unusual process to adopt ACA. Because the supporters of the legislation no longer had a filibuster-proof majority in the Senate after Republican Scott Brown won the seat vacated by Senator Kennedy’s death, the House passed the Senate version of the bill without referring the legislation to a conference committee to resolve differences between the House and Senate bills. Congress then used the reconciliation process to adopt a companion bill,

¹⁰ I.R.C. § 36B(c)(2)(C)(i) (stating that the affordability rule “shall also apply to an individual who is eligible to enroll in the plan by reason of the relationship the individual bears to the employee”); I.R.C. § 5000A(e)(1)(C) (explaining that if an individual is eligible for minimum essential coverage through an employer by reason of a relationship to an employee, affordability is determined by reference to the required contribution of the employee.)

¹¹ Prop. Treas. Reg. § 1.36B-2(c)(3)(v).

¹² 76 *Fed. Reg.* at 50,935 (Aug. 17, 2011).

¹³ Treas. Reg. § 1.36B-2(c)(3)(v)(A)(2); *see also* 77 *Fed. Reg.* 30,380 (May 23, 2012).

the Health Care and Education Reconciliation Act, that made certain amendments to the legislation. Even the most ardent supporters of the resulting legislation agree that it includes a number of inconsistencies and outright errors.

We think that the reference to dependents in section 4980H of the Code is one such error. As we have demonstrated, the shared responsibility penalties do not apply unless an employer fails to offer affordable health coverage to its full-time employees: failing to offer health coverage to dependents should not trigger the penalty.¹⁴ When the penalties do apply, they are calculated by reference to the number of the employer's full-time employees:¹⁵ the number of dependents is not relevant, regardless of whether dependents are covered by the employer's group health plan.

Even if the reference to dependents in section 4980H were sufficient to create an ambiguity in the statute, we think that the ambiguity should be resolved in the employer's favor. Where a statute creates an expensive new mandate and imposes substantial financial penalties on companies that fail to satisfy the mandate, the executive branch has an obligation to construe the mandate narrowly, so as not to impose heavier financial burdens on American businesses and job markets than Congress intended. Accordingly, we urge the President to support regulations or other guidance clarifying that employers are not obligated to offer dependent coverage and are not liable for a shared responsibility penalty if they decline to cover dependents.

Policy Considerations

Many large employers voluntarily offer dependent coverage and expect to continue offering that coverage after the shared responsibility provisions become effective. In some industries, however, employers must keep health costs to a minimum in order to remain competitive, especially when they compete with businesses outside the United States that do not face a private health mandate.

¹⁴ In fact, § 4980H(b)(1)(A) appears to apply only when an employer offers minimum essential coverage both to full-time employees *and* their dependents: under a literal reading of the statute, the § 4980H(b) penalty would not apply if an employer offered minimum essential coverage to employees, but not to dependents. We do not think this literal reading is correct; but it illustrates the broader principle that the parenthetical reference to dependents does not fit into the statute in a logical way.

¹⁵ See I.R.C. § 4980H(a) (penalty is based on the number of full-time employees employed during the month); I.R.C. § 4980H(b) (penalty is based on the number of full-time employees who lack affordable coverage with minimum value during the month).

For employers in low-margin or high-turnover businesses, the first priority must be to provide adequate health care to their employees in order to maintain a productive workforce. If these employers are forced to subsidize dependent coverage, it is likely that the additional cost will come at the expense of wages or other employee benefits, since the employers cannot increase their total compensation costs.

Some commenters have suggested that the shared responsibility provisions should be interpreted to require employers to offer unsubsidized dependent coverage. This suggestion misperceives the administrative burden that an employer must bear if it introduces dependent coverage, even on an employee-pay-all basis. The employer must redesign its group health plans to incorporate dependent coverage provisions; renegotiate its contracts with vendors; rewrite its participant communications (including summary plan descriptions, summaries of benefits and coverage, open enrollment materials, COBRA notices, privacy notices, website descriptions, and similar material); retool its administrative systems to capture information that is not required for any other purpose (such as each dependent's name, birth date, and Social Security number); and develop administrative procedures to monitor and enforce dependent eligibility requirements on an ongoing basis.

Accordingly, even if the employee pays the full cost of the dependent coverage, the employer will incur a substantial expense in order to make the coverage available. If the employer does not subsidize the cost of dependent coverage, the coverage will almost certainly be more expensive than the individual coverage a low-income employee could obtain for a dependent with a premium tax credit or other financial assistance. Merely by offering unsubsidized dependent coverage to low-income employees, the employer will make their dependents ineligible for financial assistance, at least as the law is currently written (since the affordability of dependent coverage is measured by the employee's premium for self-only coverage). If any low-income employee actually elects unsubsidized dependent coverage under the employer's group health plan, the dependent will become ineligible for financial assistance even if the employer's coverage is not affordable and does not provide minimum value.¹⁶


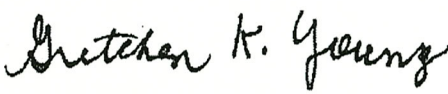
No purpose is served by requiring employers to offer unsubsidized dependent coverage that no low-income employee should elect. A mandate to provide unsubsidized dependent coverage would be burdensome for employers and

¹⁶ See I.R.C. § 36B(c)(2)(C)(iii) (a dependent is deemed to have minimum essential coverage, and thus is not eligible for a premium tax credit or other financial assistance, if the dependent is covered by *any* employer group health plan, regardless of the plan's cost or level of coverage).

confusing (and possibly detrimental) for employees and their dependents. The mandate would not accomplish ACA's central goal, which is to increase access to affordable health coverage.

Thank you for considering the issues raised in this letter. We would be glad to discuss the dependent coverage issue with you or members of your staff if further information would be helpful.

Sincerely,

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