ERIC

The
ERISA
Industry
Committee

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Room 5203
Internal Revenue Service
P.O. Box 7604
Ben Franklin Station
Washington, DC 20044

RE: Minimum Value of Eligible Employer-Sponsored Plans and Other Rules Regarding the Health Insurance Premium Tax Credit (RIN 1545-BL43)

Ladies and Gentlemen:

The ERISA Industry Committee ("ERIC") is pleased to respond to the request of the Internal Revenue Service (the "IRS") for comments regarding provisions contained in the Minimum Value of Eligible Employer-Sponsored Plans and Other Rules Regarding the Health Insurance Premium Tax Credit proposed regulations (the "proposed regulations").[1]

ERIC's Interest in the ACA

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's members devote considerable time and resources to their benefit plans. However, they must balance the provision of high quality, affordable health care with the need to contain the costs for these programs. Any additional burdens placed on plans could adversely impact the ability of these employers to continue to provide generous benefits and could result in increased costs for participants.

Overview

The Affordable Care Act ("ACA") provides that applicable large employers may face one of two penalties under section 4980H of the Internal Revenue Code.[2]

Under section 4980H(a), if an applicable large employer fails to offer its full-time employees (and their dependents) the opportunity to enroll in minimum essential

[1] Internal Revenue Service, *Minimum Value of Eligible Employer-Sponsored Plans and Other Rules Regarding the Health Insurance Premium Tax Credit*, 78 Fed. Reg. 25909 (May 3, 2013).
[2] All references are to the Internal Revenue Code of 1986, as amended, unless otherwise noted.

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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, provided that at least one full-time employee receives a premium tax credit or cost-sharing reduction through a state exchange.

Under section 4980H(b), if an applicable large employer offers minimum essential coverage, but the coverage is not affordable or does not meet the minimum value standard, 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 through a state exchange.

Individuals are also subject to the ACA and are generally required to maintain minimum essential coverage, such as through an employer-sponsored plan or coverage obtained through the Exchanges, in order to avoid being subject to a penalty.

Individuals may be eligible for a premium tax credit for coverage they obtain through the Exchanges. However, they cannot receive a premium tax credit if they are eligible for affordable coverage under an eligible employer-sponsored plan that provides minimum value.[3] A plan is considered affordable for an employee if the portion of the annual premium the employee must pay for self-only coverage does not exceed 9.5 percent of the taxpayer's household income. Subject to a special transition rule for 2014, the proposed regulations provide that wellness incentives that affect premiums are taken into account for affordability purposes only if they relate to tobacco use.[4]

Summary of Comments

ERIC recommends that the IRS adopt the following revisions to the proposed regulations:

- All wellness incentives should be taken into account for affordability purposes, not just those related to tobacco use.

- The application of the transition rule for wellness incentives should be clarified with respect to mergers and acquisitions.

- A safe harbor should be available for plans that have copayments.

- If included in the final regulation, the IRS should provide statutory justification for the assertion in the preamble that employers may not cover employees in an employer-sponsored health plan unless the employee may opt out of coverage.

- The proposed regulations' treatment of retiree coverage should be maintained in the final regulations.

- Stand-alone HRAs should not be considered minimum essential coverage for pre-Medicare eligible retirees under specified circumstances.

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[3] Internal Revenue Code § 36B.
[4] Prop. Treas. Reg. § 1.36B-2(c)(3)(v)(A)(4), 78 Fed. Reg. at 25914.

Detailed Comments

I. All wellness incentives should be considered for affordability purposes, not just those related to tobacco use.

A. Wellness programs improve the health of employees, while reducing health care costs.

Recent research has added to the evidence that wellness programs help workers to achieve better health. In fact, research performed for the Departments of Labor and Health and Human Services found "statistically significant and clinically meaningful improvements in exercise frequency, smoking behavior, and weight control..." by wellness program participants.[5] Companies also benefit when effective wellness programs improve the health of their employees.[6] Workplace wellness programs have been effective in containing health costs, reducing disability claims, and improving workers' productivity. Additionally, they improve the quality of life for American workers and their families by promoting healthy lifestyles.[7] Employees value these programs, and they benefit from their emphasis on promoting good health and addressing health problems before the problems become more serious and more expensive to treat.

Thus, the promotion of wellness for all American workers, and their families, has become of paramount importance. An effective wellness program is one of the few tools available to employers to reduce health care costs while simultaneously providing tangible benefits to both employees and employers.

ERIC encourages the IRS to consider the value provided by all effective workplace wellness programs when finalizing the regulations.

B. Congress strongly supported all types of wellness programs in the ACA, not just tobacco cessation programs.

In the ACA, Congress strongly encourages the use of all wellness programs, not just those related to tobacco use.[8] Expanding on reward limits originally included in the regulations to the Health Insurance Portability and Accountability Act of 1996 ("HIPAA"), the ACA authorizes the Secretaries of Labor, Health and Human Services, and the Treasury to increase the limit on wellness incentives to 30% of the cost of employee coverage for most wellness programs and up to 50% for wellness programs that are designed to prevent or reduce tobacco use. While the larger reward limit available for smoking cessation programs may reflect a heightened Congressional sensitivity to the harmful effects of tobacco use, there is no indication that the higher reward limit is rooted in a

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[5] Soeren Mattke et al., *Workplace Wellness Programs Study Final Report*, RAND Health (May 2013), available at http://www.dol.gov/ebsa/pdf/workplacewellnessstudyfinal.pdf.

[6] Ross DeVol & Armen Bedroussian, *An Unhealthy America* 131-32 (Milken Institute Oct. 2007) (estimating $1B annually in lost employee productivity due to reduced performance and missed workdays related to chronic disease), *available at* http://www.milkeninstitute.org/pdf/chronic_disease_report.pdf.

[7] Vicki S. Conn et al., *Meta-Analysis of Workplace Physical Activity Interventions*, 37 Am. J. Preventative Med. 330, 333-34 (2009) (surveying wellness program studies and finding statistically significant improvement in fitness, diabetes risk and participant-reported quality of life and mood for certain studies), *available at* http://www.ajpmonline.org/article/S0749-3797(09)00413-9/.

[8] *See generally*, ERIC Comment Letter, *Guidance for Voluntary Workplace Wellness Programs* 3 (Mar. 8, 2011), available at http://www.eric.org/uploadFiles/279E600000233.filename.Wellness_Letter_Agencies030811.pdf.

perception that smokers have a greater individual responsibility for their health than do other participants in wellness programs.

The proposed regulations provide that the affordability of an employer-sponsored plan and whether a plan provides minimum value are determined by assuming that each employee fails to satisfy the requirements of a wellness program, except that wellness incentives that relate to tobacco use may be taken into consideration in determining an employee's required contribution.[9] The preamble to the proposed regulations states "This exception is consistent with other [ACA] provisions (such as the ability to charge higher premiums based on tobacco use) reflecting a policy about individual responsibility regarding tobacco use."[10]

The position taken by the IRS in the proposed regulation is neither required nor directed by the statutory language of the ACA, where Congress clearly indicated its support for all types of wellness programs, not just those that focus on decreasing Americans' use of tobacco.

C. Employers should not be subject to a penalty if workers do not take advantage of the costs savings that are available to them.

As discussed above, the penalty under section 4980H(b) applies if an applicable large employer offers minimum essential coverage to an employee, but the coverage is not affordable or does not meet the minimum value standard, and the employee obtains subsidized coverage in an Exchange. The proposed regulations provide that only wellness incentives that relate to tobacco usage are taken into account when determining whether employer-sponsored coverage is affordable and whether a plan provides minimum value.[11]

The selective recognition of wellness incentives, as proposed in these regulations, discourages the most effective and efficient use of wellness programs by those employees who would most benefit from incentives to become healthier. Wellness programs with incentives are particularly beneficial for lower-wage workers because the amounts they receive are proportionately greater for them. As a result, there is more to be gained from working to achieve a "better" health outcome.

In addition, employers whose programs become more expensive to operate because of these regulatory constraints may be forced to scale back the programs themselves, which ultimately hurts the very workers whom the programs were designed to help.

Additionally, the final wellness regulations issued by the IRS and other agencies go to great lengths to ensure that all eligible employees are able to earn the wellness incentives that are available to them.[12] Employees almost always will have the opportunity to ask for "reasonable alternatives" to any incentives offered by a wellness program, and many efforts will be made to notify employees of the availability of these alternatives. Further, under the regulation, the full amount of the incentives must be made available to all similarly situated individuals. As a result, employees will be given more than ample opportunities to earn any wellness incentives and will be given alternative pathways where they cannot meet the original standard.

[9] Prop. Treas. Reg. § 1.36B-2(c)(v)(A)(4), 78 Fed. Reg. at 25914.
[10] 78 Fed. Reg. at 25911.
[11] *Id*.
[12] 78 Fed. Reg. 33158 (Jun. 3, 2013).

Companies should not be penalized for trying to reduce the cost of health care through the effective use of wellness programs that comply with all the protections and safety valves required in the final wellness regulation. In particular, given the availability of numerous alternatives to employees who wish to obtain a reward, employers should not be the ones forced to pick up the tab for the unhealthy behavior of employees who choose not to participate in these programs. Neither employers *nor their fellow employees* should be forced to subsidize the unhealthy behavior of workers who choose not to pursue the cost savings available to those who participate in these wellness programs.

Furthermore, if the IRS does not permit employers to assume that non-tobacco-related incentives have been earned in wellness programs for purposes of the affordability test, it sends a message to workers that they can simply go to the Exchanges to avoid the consequences of non-participation in a wellness program. The Exchanges should not be a government-sanctioned refuge for employees who are unwilling to take responsibility for improving their health.

ERIC urges the IRS to modify the proposed rules to provide that the affordability of an employer-sponsored plan (and whether the plan provides minimum value) are determined by assuming that each employee satisfies the requirements of any wellness program, not just those related to tobacco use. At a minimum, this rule should prevail for purposes of the shared responsibility penalty applicable to employers, even if non-tobacco-related incentives in wellness programs are not to be taken into account for purposes of determining an individual's eligibility for a subsidy.

II. The transition rule for wellness incentives should be clarified for mergers and acquisitions.

The preamble to the proposed regulations includes a transition rule for wellness incentives. It states that companies will not be subject to a penalty under section 4980H for their group health plans for any employee who received a premium tax credit if coverage would have been affordable or satisfied the minimum value rules if the employee had satisfied the requirements for the company's wellness program. The transition rule: (1) applies for plan years beginning before January 1, 2015; and (2) is based on the amount that was available under the terms of a wellness plan in effect on May 3, 2013. Additionally, the transition rule only applies to an "employee who is in a category of employees eligible under the terms of the wellness program as in effect on May 3, 2013 (regardless of whether the employee was hired before or after that date)."[13] This language in the preamble clearly indicates that the rule applies to new hires, but does not address employees acquired in mergers and acquisitions.

Many employers will have wellness programs that satisfy the transition rule. Some of the employers that sponsor these plans will acquire companies during the transition period that do not have wellness programs that satisfy the transition rule. One potential interpretation of the proposed regulations is that the transition rule would not apply when a company with a wellness program otherwise meeting the transition rule acquires, or merges with, another company. The reason is that the employees of the acquired company would not technically comply with the terms of the transition rule, i.e., these employees would not be in a category of employees eligible under the terms of the wellness program as in effect on May 3, 2013. We believe that the transition rule should cover these

[13] 78 Fed. Reg. at 25911.

newly acquired employees as well if they are eligible for the wellness program once their company is acquired.

ERIC urges the IRS to issue guidance that clarifies that employees that become newly eligible for a wellness program as a result of a merger or acquisition are treated the same as new hires for purposes of the transition rule during 2014.

III. The IRS should include a safe harbor that is available for plans that have copayments.

The proposed regulations include design-based safe harbors that can be used to determine whether a plan provides minimum value.[14]

However, none of these safe harbor designs can be used for many common plan designs that include copayments for office visits and other services. The use of copayments is a common plan design – 73% of covered workers pay a copayment for office visits with a primary care physician or a specialist physician.[15] Plans that use copayments that cannot establish that they satisfy the minimum value rule using the Minimum Value Calculator will need to obtain an actuarial certification that they pass this standard.

ERIC urges the IRS to create safe harbors for plans that include copayments for office visits and other services.

IV. The IRS should provide statutory authority for its statement in the preamble that employers may not require employees to be covered in certain types of health plans.

The preamble to the proposed regulations suggests that it may not be permissible for an employer to require that an employee be covered by a health plan that does not meet the affordability or minimum value standards unless the employee is permitted to opt out of the plan. It states "Any arrangement under which employees are required, as a condition of employment or otherwise, to be enrolled in an employer-sponsored plan that does not provide minimum value or is unaffordable, and that does not give the employees an effective opportunity to terminate or decline the coverage, raises a variety of issues."[16] The preamble questions whether such activity would impermissibly interfere with an individual's ability to apply for a premium tax credit.

ERIC requests that the IRS clarify the statutory authority under which it would find coverage of this sort to be impermissible. If the IRS does intend to prohibit coverage that does not meet the minimum value or affordability standards without permitting employees to opt out of this coverage, then ERIC urges the IRS to: (1) utilize a separate proposed rulemaking that gives notice and an opportunity for public comment, rather than merely making a statement in the preamble of these regulations; and (2) provide generous transition relief, at a minimum, so that employers have a reasonable chance to adjust any prevailing contractual commitments that currently require them to cover employees in such programs.

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[14] Prop. Treas. Reg. § 1.36B-6(d); 78 Fed. Reg. at 25916.

[15] Kaiser Family Foundation and Health Research and Educational Trust, Employer Health Benefits 2012 Annual Survey (Sept. 2012), available at http://ehbs.kff.org/.

[16] 78 Fed. Reg. at 25910.

V. The proposed regulations' treatment of retiree coverage should be maintained in the final regulation.

The proposed regulations provide that a pre-Medicare eligible retiree who can elect retiree coverage is considered eligible for minimum essential coverage only for the months that he or she actually enrolls in the retiree plan.[17] This is an important distinction for these individuals because it means that they will be eligible to obtain coverage through an Exchange plan and may be eligible for a premium or cost-sharing subsidy as well, provided they do not enroll in the retiree health coverage offered by their former employer.

We applaud the IRS for including this provision in the proposed regulations. Many retirees prefer to have a variety of health care options available to them so they can choose the one that best suits their specific needs and financial situation. For some retirees, the best option for them will be the retiree health plan from their former employer. For others, the best option for the retiree and his or her family will be a policy purchased through an Exchange, possibly with a subsidy. The proposed regulations give retirees the flexibility they need to optimize this important choice.

ERIC urges the IRS to retain this rule for retired employees when it finalizes the regulation.

VI. Stand-alone HRAs should not be considered minimum essential coverage for pre-Medicare eligible retirees under specified circumstances.

As noted in section V., pre-Medicare eligible retirees who are offered minimum essential coverage by their former employers are not precluded from obtaining subsidized coverage in an Exchange, provided they do not enroll in the former employer's health coverage. A stand-alone Health Reimbursement Account (HRA), because it is considered a group health plan, would be considered to be minimum essential coverage for these purposes.

These stand-alone HRAs, however, do not provide health coverage in a traditional sense; often they more closely resemble savings accounts than health plans, where employers may contribute on a one-time or continuing basis. Further, many pre-Medicare eligible retirees are automatically covered by a stand-alone HRA and are not otherwise eligible for major medical coverage from the former employer. Because of this HRA coverage, they would not be able to obtain subsidized medical coverage from an Exchange.

Under certain circumstances, a stand-alone HRA should not preclude a pre-Medicare eligible retiree from obtaining subsidized coverage in an Exchange. For instance, amounts accumulated in an HRA prior to January 1, 2014 should not disqualify a pre-Medicare eligible retiree from participating in an Exchange and, potentially, becoming eligible for subsidized coverage there. These pre-2014 amounts will have been contributed before any individuals were eligible to enroll in an Exchange and thus should not be bound by rules applicable to years after 2013.

Further, pre-Medicare eligible retirees should be permitted to continue to have an HRA during a period for which the retiree receives subsidized coverage in an Exchange, provided the HRA is "suspended" for that period. In keeping with an analogous situation described in Revenue Ruling

[17] Prop. Treas. Reg. § 1.36B-2(c)(3)(iv); 78 Fed. Reg. at 25914.

2004-45,[18] a pre-Medicare eligible retiree should be deemed to have elected not to enroll in the stand-alone HRA – thus remaining eligible for the premium tax credit – during any period in which the retiree and any applicable family members are not able to draw on HRA funds contributed after 2013 for the reimbursement of medical expenses (other than expenses that constitute "excepted benefits"). During this period of suspension, an employer should be permitted to continue to make employer contributions to the HRA; thus, the maximum available amount under the HRA would not be affected by the suspension but would be available only after the period of suspension had terminated.

Thus, ERIC urges the IRS to clarify that amounts accumulated in an HRA prior to January 1, 2014 would not disqualify a pre-Medicare eligible retiree from receiving subsidized coverage in an Exchange and that pre-Medicare eligible retirees are permitted to continue to have stand-alone HRAs for any period during which they receive subsidized coverage in an Exchange, provided their HRA is "suspended" for this period.

ERIC appreciates the opportunity to provide comments on the proposed regulations. If the IRS has any questions concerning our comments, or if we can be of further assistance, please contact us at (202) 789-1400.

Sincerely,

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[18] I.R.S. Rev. Rul. 2004-45, 2004-1 C.B. 971.