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Creative Health Benefits Solutions for Today, Strong Policy for Tomorrow

June 17, 2011

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

The Honorable Douglas H. Shulman
Commissioner of Internal Revenue
CC:PA:LPD:PR (Notice 2011-36)
Room 5203
Internal Revenue Service
P.O. Box 7604
Ben Franklin Station
Washington, DC 20044

**Re: Notice 2011-36 – Request for Comments on Shared Responsibility for
Employers Regarding Health Coverage (Section 4980H)**

Dear Commissioner Shulman:

The National Business Group on Health is pleased to respond to the Request for Comments on Shared Responsibility for Employers Regarding Health Coverage (Section 4980H).

The National Business Group on Health represents approximately 330 primarily large employers, including 64 of the Fortune 100, who voluntarily provide health benefits and other health programs to over 50 million American employees, retirees, and their families. Our members employ and provide health benefits for employees under a wide variety of work arrangements, including full-time, part-time, seasonal, and temporary. In addition, our members often operate multiple lines of business and tailor employee work and benefit arrangements to the specific needs of each line of business.

As our members prepare for implementation of state exchanges and assessable payments required by the Patient Protection and Affordable Care Act (Affordable Care Act), a primary concern will be minimizing the administrative and cost burdens associated with Affordable Care Act requirements. Allowing plan sponsors flexibility to adapt their Affordable Care Act compliance procedures to existing work, benefit, and payroll arrangements will reduce these burdens and allow plan sponsors to devote more resources toward maintaining and improving health benefits for their employees. Therefore, the National Business Group on Health welcomes the Service's efforts to ensure that plan sponsors have flexible and workable options and greater predictability in complying with

§ 4980H of the Internal Revenue Code (Code) and the 90-day waiting period limitation under § 1201 of the Affordable Care Act. **Specifically, the National Business Group on Health supports:**

- (1) Flexibility to determine “hours of service” and full-time status based on plan sponsors’ existing work and payroll arrangements for employees;**
- (2) A look-back/stability period safe harbor that allows plan sponsors a measurement period and stability period of up to 12 months (coinciding with the fiscal or plan year) and a 3-month administrative interval;**
- (3) Allowing exceptions to the Affordable Care Act’s employer responsibility requirements for nonresident alien, seasonal, and temporary employees;**
- (4) Permitting plan sponsors to apply a waiting period of up to 90 days after an employee satisfies plan enrollment and eligibility requirements; and**
- (5) Coordination between § 4980H with the 90-day waiting period limitation such that a waiting period of up to 90 days commences after the measurement period under the look-back/stability period safe harbor.**

We provide further discussion of these recommendations and responses to the Service’s specific requests for comments below.

I. Definition of “Hours of Service”

For purposes of determining assessable payments under Code § 4980H, “hours of service” should include only hours actually worked by an employee.

The Service proposes to incorporate the definition of “hours of service” under existing labor regulations into regulations under Code § 4980H. This definition, which includes hours for which an employee is entitled to payment due to vacation, holiday, illness, incapacity (including disability), layoff, jury duty, military duty, or leave of absence may be appropriate for a retirement plan’s participation and vesting rules. However, in the health plan context, including these hours for purposes of determining assessable payments under § 4980H could create significant administrative and cost burdens for plan sponsors.

National Business Group on Health members may offer paid leave for vacation, holiday, illness, incapacity (including disability), layoff, jury duty, military duty, or a leave of absence, but a single plan sponsor does not necessarily do so with respect to all of these types of leave. In addition, a plan sponsor may maintain different paid time off policies for different types of employees, especially if the employees work in different lines of business. Requiring plan sponsors to track all of these types of leave, if paid, as “hours of service” for purposes of determining assessable payments would, for many of our members, involve substantial reprogramming of existing recordkeeping and payroll

systems. This reprogramming could involve significant costs for plan sponsors, which would diminish the resources available for maintaining employees' health benefits. Furthermore, including all of these types of leave, if paid, as "hours of service" may create an incentive for plan sponsors to eliminate certain types of paid leave. Therefore, for purposes of Code § 4980H, we recommend that the Service define "hours of service" to include only hours that an employee actually worked. This definition would provide a single, uniform standard for determining hours of service and minimize administrative and cost burdens for plan sponsors.

II. Methods for Determining Full-Time Employees under § 4980H

The National Business Group on Health supports the Service's proposal of a look-back/stability period safe harbor for purposes of determining full-time employees under § 4980H. This safe harbor would make assessable payments more predictable for plan sponsors, provide greater stability in coverage for employees, and simplify the process of determining whether employees are full-time for § 4980H purposes, particularly for businesses where employees' work hours vary frequently. However, our members have some specific concerns regarding implementation of the safe harbor for which we offer the following recommendations:

A. *Regulations should clarify that a plan sponsor can use a measurement and stability period of up to 12 months such that the safe harbor stability period coincides with the plan sponsor's fiscal year or plan year.*

While plan sponsors may wish to use measurement/stability periods of less than one year, many of our members already determine whether an employee has part-time or full-time status on a fiscal year or plan year basis so that employees who change from part-time to full-time status in a given year, for example, can enroll in benefits based on the new status during the open enrollment period for the following year. For these plan sponsors, having the safe harbor measurement and stability periods coincide with the fiscal or plan year would maximize efficiency when determining assessable payments and enrolling employees in health coverage, if necessary. Therefore, we recommend that regulations implementing the safe harbor clarify that plan sponsors can use a 12-month measurement and stability period that coincides with a fiscal year or plan year. We also support allowing plan sponsors flexibility to use measurement/stability periods of 3 to 12 months.

B. *The safe harbor should allow an administrative interval of at least 3 months to allow plan sponsors time to perform the look-back calculation, notify employees of plan eligibility, and enroll employees in coverage, if applicable.*

For National Business Group on Health members, an administrative interval between the measurement and stability periods will be crucial if they are to avail themselves of the safe harbor. For many large plan sponsors, performing the look-back calculation, notifying employees of plan eligibility, and enrolling employees in coverage, if necessary, will involve fairly extensive administrative procedures and coordination with plan vendors. A 3-month administrative interval, at minimum, will be necessary to

complete this process. Furthermore, a 3-month interval will allow employees time to plan for their coverage needs and enroll in alternate coverage, if necessary.

C. *The safe harbor should allow plan sponsors to use different stability periods for different groups of employees.*

Although we anticipate that many employers will find it most efficient to use a single stability period for all employees, the Service should take into account that large employers often operate multiple lines of business and tailor employee work and benefit arrangements to the specific needs of each line of business. In addition, large employers often allow acquired entities to maintain their existing work and benefit arrangements to minimize disruption for employees who work for the acquired entity. For such an employer, implementing a single measurement/stability period for all lines of business may necessitate changes to existing work and benefit arrangements, which could be highly disruptive for employees and the employer's existing administrative and recordkeeping processes. Therefore, the safe harbor should allow employers use different stability periods for different groups of employees when appropriate for their business needs.

D. *Generally, the safe harbor should allow employers flexibility to adapt measurement/stability periods to the needs of their businesses and employees.*

Because the safe harbor may involve substantial plan recordkeeping and other administrative requirements, we anticipate that employers will strive to maintain consistent and often longer measurement and stability periods. Therefore, we believe that few plan sponsors will attempt to "manipulate" the safe harbor to minimize assessable payments. However, plan sponsors' business needs and employee populations can vary widely and change over time, and the safe harbor should allow sufficient flexibility to accommodate these changes. Therefore, the National Business Group on Health recommends that the safe harbor:

- Permit a plan sponsor to change a measurement/stability period mid-plan year if necessary for business purposes;
- Permit a plan sponsor to start a measurement period on the date of hire, first date of the calendar month, or first date of the pay period, depending on the plan sponsor's specific recordkeeping procedures;
- Permit a plan sponsor to select a measurement period of less than a year but select a stability period designed to provide coverage on a plan year basis; and
- Permit a plan sponsor to apply the safe harbor to new employees who have not been employed for an entire measurement period or employees who move into full-time status during the year in the same manner that the safe harbor applies to other employees.

III. Appropriate Exceptions under Employer Responsibility Provisions

Regulations should provide exceptions to the employer responsibility provisions of § 4980H for seasonal, temporary, and nonresident alien employees.

National Business Group on Health members are committed to maintaining high quality health coverage for their employees. However, we do not believe that the penalties under § 4980H associated with failing to provide coverage for “full-time employees” were intended to apply to employees who are not commonly viewed as “full-time”—such as seasonal or temporary employees who are employed for less than 6 months—even if they meet the 30 hour per week threshold. For example, many of our members employ students who work only during summer months. These students may work 30 or more hours for each of these months but are likely to maintain health coverage through their parents or schools. Employers should not be required to pay penalties with respect to such seasonal or temporary employees, given that these employees are not likely to benefit from employer-sponsored coverage and that the coverage would be available only for a limited period. Likewise, as noted in the Service’s request for comments, nonresident alien employees are not required to maintain health coverage under the Affordable Care Act. Therefore, we do not believe that the Affordable Care Act’s underlying intent was to impose penalties on employers who do not offer coverage to these employees.

IV. Flexibility in Implementing § 4980H

Regulations under § 4980H should allow plan sponsors a “cure period” and flexibility to apply § 4980H separately to different lines of business.

As noted above, allowing plan sponsors flexibility to adapt their Affordable Care Act compliance procedures to existing work, benefit, and payroll arrangements will reduce administrative and cost burdens, thereby allowing plan sponsors to devote more resources toward maintaining and improving health benefits for their employees. To that end, the National Business Group on Health recommends providing a “cure period” under § 4980H that would allow a plan sponsor to provide coverage for an employee retroactively instead of making an assessable payment. Thus, in the event that the plan sponsor inadvertently fails to provide coverage so that an employee becomes eligible for the premium tax credit under Code §36B or cost-sharing reduction under §1402 of the Affordable Care Act, the plan sponsor should be allowed a period of up to 3 months, for example, to “cure” and enroll the employee in health coverage so the employee does not have to obtain coverage through an exchange. This cure period would allow plan sponsors to fix administrative errors and reduce the costs of complying with § 4980H.

In addition, we recommend allowing plan sponsors flexibility to apply § 4980H separately to different lines of business. As described above, our members often operate different lines of businesses and tailor work and benefits arrangements to the specific needs of each line of business. Thus, even though separate lines of business may be

treated as a single employer for purposes of the definition of “applicable large employer” under § 4980H, these lines of business may operate as if they were separate employers. We believe that plan sponsors should continue to have the flexibility to tailor work and benefits arrangements to specific lines of business and therefore recommend allowing plan sponsors to disaggregate their assessable payment determinations under § 4980H on a reasonable basis, e.g., by lines of business. Allowing plan sponsors to do so would reduce incentives to eliminate coverage entirely and further the Congressional intent of having employers continue providing coverage for their employees.

V. 90-Day Waiting Period Limitation

A. *Plans should be permitted to apply a period of up to 90 days after an employee satisfies plan eligibility and enrollment rules.*

As noted above, the National Business Group on Health supports allowing plan sponsors flexibility to adapt their Affordable Care Act compliance procedures to existing work, benefit, and payroll arrangements. Because many of our members administer health benefits for very large and varied employee populations and experience high employee turnover, maintaining eligibility rules based on employee classification (e.g., part-time vs. full-time) and waiting periods of up to 90 days are often critical to the efficient administration of our members’ group health plans. Requiring plan sponsors to change eligibility and enrollment rules to satisfy the 90-day waiting period limitation could present substantial administrative and cost burdens, which would reduce resources available to maintain health benefits. Therefore, we recommend that plan sponsors be permitted to maintain existing eligibility and enrollment rules and a waiting period of up to 90 days, consistent with the definition of “waiting period” under current HIPAA regulations. Thus, health plans should be permitted to:

- Require continuous service to satisfy a waiting period of up to 90 days;
- Enroll employees in coverage on the first day of the month (or quarter) after completing 90 days of service;
- Enroll employees in coverage 90 days after completion of a required probationary period;
- Enroll employees in coverage 90 days after changing from seasonal, temporary, or part-time status to full-time status;
- Enroll employees in coverage 90 days after satisfying eligibility requirements during a look-back measurement period under the safe harbor; or
- Enroll employees in coverage 90 days after meeting plan eligibility requirements and completing the plan’s enrollment process.

B. *Plans should be permitted to apply a waiting period of up to 90 days after an applicable measurement period under the look-back/stability period safe harbor.*

The National Business Group on Health supports coordinating look-back/stability period safe harbor rules with the 90-day waiting period limitation. However, we stress that the measurement period and waiting period serve different purposes. The measurement period under the safe harbor would allow plan sponsors predictability and stability in determining which employees have full-time status for purposes of the Affordable Care Act's assessable payments. Waiting periods allow a plan sponsor to provide health coverage to employees who maintain a stable employment relationship with the plan sponsor. Because the measurement period and waiting period serve different purposes, a plan sponsor should be permitted to apply a waiting period of up to 90 days after any applicable measurement period.

Again, thank you for considering our comments and recommendations on the shared responsibility provisions in § 4980H of the Internal Revenue Code and the 90-day waiting period limitation under § 1201 of the Affordable Care Act. Please contact me or Steven Wojcik, the National Business Group on Health's Vice President of Public Policy, at (202) 558-3012 if you would like to discuss our comments in more detail.

Sincerely,



Helen Darling
President

cc: The Honorable Phyllis C. Borzi, Employee Benefits Security Administration, U.S. Department of Labor
Mr. Steve Larsen, Center for Consumer Information and Insurance Oversight, U.S. Department of Health and Human Services