Employers for Flexibility in Health Care

April 5, 2012

Submitted electronically via: e-ohpsca-er.ebsa@dol.gov
Office of Health Plan Standards and Compliance Assistance
Employee Benefits Security Administration
Room N-5653
U.S. Department of Labor
200 Constitution Ave. NW
Washington DC, 20210

Re: Frequently Asked Questions From Employers Regarding Automatic Enrollment, Employer Shared Responsibility, and Waiting Periods (Notice 2012-17)

We are writing in response to the above request for comments on behalf of the Employers for Flexibility in Health Care ("EFHC") Coalition, a group of leading trade associations and businesses in the retail, restaurant, hospitality, construction, temporary staffing, and other service-related industries, as well as employer-sponsored plans insuring millions of American workers. Members of the EFHC Coalition are strong supporters of employer-sponsored coverage and have been working with the Administration as you implement the Patient Protection and Affordable Care Act ("PPACA") to help ensure that employer-sponsored coverage – the backbone of the US health care system – remains a competitive option for all employees whether full-time, part-time, temporary, or seasonal workers.

For the past year, the EFHC Coalition has participated in numerous meetings with the Administration and has developed substantive policy recommendations in a concerted effort to assist the Administration in developing regulatory guidance on the major provisions of PPACA that affect employers (see attachments: comment letters submitted on June 17 re: Notice 2011-36 and October 31 re: Notice 2011-73, et al., respectively). We have consistently taken the view that it is imperative the Administration examine the employer provisions as a whole when developing regulatory guidance because the employer requirements under the law are inextricably linked. As we examine the interplay between these new requirements, it is clear they have significant consequences for employers and their ability to maintain flexible work options and affordable health coverage for their employees. Thus, we have provided comprehensive comments on the workability of the definition of full-time employee, the 90-day waiting period, the affordability and minimum value standards, and the reporting requirements under the law.

We have also discussed at length our concerns about the 50+ state process as issued in the final Exchange regulation (CMS-9989-F) for making eligibility determinations about the affordability of employer coverage for employees. This state-by-state approach creates administrative difficulties for multi-state employers and an inconsistent experience for our employees. Furthermore, we strongly support the establishment of a separate process in which the Internal Revenue Service verifies employees' eligibility for tax credits before assessing tax penalties on employers.

We appreciate the issuance of requests for comments by the Administration to seek input from the employer community before issuing formal regulatory guidance and the Administration's receptivity to our comments. However, we are increasingly concerned that formal guidance or rules on the employer shared responsibility requirements have not been issued. Our members and companies are growing concerned that if they do not have sufficient regulatory guidance soon, they will not be able to conduct the necessary budget and planning processes to comply with the implementation deadline of 2014. To be ready for plan years beginning after December 31, 2013 (and to conduct open enrollment in the fall of 2013), many of our members will need to determine their budgets and plan designs *now*, or at the latest, the summer of 2012. The issuance of formal rules is critically important to allow employers sufficient time to determine new benefit designs that meet the law's requirements;

bring their IT systems into compliance for payroll, reporting, and other mechanisms; and to communicate the new rules to their store or company managers and their employees. Based on the Administration's own experience with the length of time needed to budget for, plan for, and develop reporting processes and IT systems, we hope you will recognize that it is unreasonable to expect employers to meet the 2014 compliance deadlines if final rules are not provided *in the next few months*.

The lack of formal guidance and rules underscores the EFHC Coalition's support for the Department of Treasury's recognition in its August 17, 2011, notice of proposed rulemaking that transition relief may be essential to preserving employer-sponsored coverage as the new requirements under PPACA take effect in 2014. The EFHC Coalition strongly encourages the Administration to delay the implementation of the penalties under Internal Revenue Code ("IRC") §4980H(b) until 2016 to allow the Administration time to evaluate at least one year of data and to provide time for employers to adjust their plan designs as needed. This transition period will help the Administration evaluate the impact of the new requirements and deter employers from reactively dropping coverage if it is determined that revisions to the rules are necessary once all of the provisions are effective. Such transition relief could be provided specifically for employers who offer coverage to employees and are working to meet PPACA's requirements without undermining the intent of the shared responsibility requirements of the law for employers or individuals.

In response specifically to the Notice 2012-17, we will use this letter to address:

I. Proposal for newly hired employees;
II. The determination of full-time employee status;
III. Coordination of Look-Back with 90-Day Waiting Period;
IV. Coordinated reporting mechanisms; and
V. The affordability safe harbor and use of current wages.

I. Proposal for Newly Hired Employees

For purposes of determining whether employees (other than newly-hired employees) are full time, Notice 2012-17 provides that employers will be allowed to use a look-back/stability period safe harbor of up to 12 months as described in Notice 2011-36. Although there is no statutory requirement to create separate rules distinguishing between newly hired and current employees, Notice 2012-17 proposes a different rule for the purposes of determining whether "newly hired" employees are full time. Under the approach, if, at the time of hire, an employer cannot reasonably determine that a newly hired employee is expected to work full-time, and if the employee's hours during the first three months after hire are reasonably viewed as not representative of the average hours the employee is expected to work on an annual basis, the employer is permitted an additional three-month period to determine the employee's status without penalty under IRC §4980H.

The EFHC Coalition believes this approach is complex, administratively difficult for employers to implement, and unnecessary. Some employers in our Coalition hire hundreds of new employees each day. Tracking and making subjective assessments about the status of each employee every three months is administratively burdensome to the employer and makes it difficult for employees (who must maintain coverage under the individual mandate) to make decisions about whether to enroll in other coverage. It is unclear what happens after the first two three-month review periods, what additional obligations the employer would incur, and when an employee would cease to be a "new hire." The proposed approach also fails to recognize that there are many situations, outside of hiring, in which an employee may become "newly eligible" for a plan, including promotion, change in status, or meeting an up-front work requirement.

The EFHC Coalition strongly supports the use of a uniform methodology for determining full-time employee status and eligibility for the plan as outlined below.

II. Determination of Full-time Employee Status

As stated in our June 17 and October 31, 2011 letters responding to Notice 2011-36 and Notice 2011-73, respectively, the definition of full-time employee is of paramount concern to the EFHC Coalition because of our industries' unique reliance on large numbers of part-time, temporary, and seasonal workers with fluctuating and unpredictable work hours, as well as unpredictable lengths of service.

In situations where an employee is hired for or promoted to a position that the employer classifies as full time, the employee will be eligible for the employer's health plan after the applicable waiting period. However, the statute does not impose penalties on employers who do not offer coverage to part-time employees. Thus, it is a reasonable interpretation of the statute to permit employers to select a look-back period to determine whether new or current employees of unknown or part-time status become eligible for the employer's health plan and then provide a commensurate coverage stability period for those determined to be eligible. The EFHC Coalition would like to reiterate our support for the Administration's proposed "look-back/stability period safe harbor method" for determining which employees would be considered full time for a particular coverage period for all employees of unknown or part-time status. Employers should have the flexibility to choose a look-back period of up to 12 months depending on the nature of their business and their workforce.[1]

A 12-month look-back is important to employers because it would allow employers to enroll newly eligible employees in conjunction with a company's annual open enrollment process. Moving eligible employees onto an annual open enrollment process allows employers to use a uniform methodology across their employee population, improves plan administration, and provides employees' with a more predictable enrollment experience for health coverage, as well as other employer-sponsored benefits, including dental, vision, and retirement accounts. A 12-month look-back would also allow for a 12-month stability period, which helps employees by reducing churn between employer and Exchange coverage, thereby minimizing disruption of employees' coverage and annual benefits (i.e., annual deductibles and maximum out-of-pocket costs), as well as maintaining continuity of care.

III. Coordination of Look-Back with 90-Day Waiting Period

The 90-day waiting period is intended to establish a reasonable connection between the employer and the employee prior to the offer of coverage through an employer plan. However, we do not believe that the 90-day waiting period statutory language creates a distinction between newly hired and current employees.

The law states that "a group health plan or a health insurance issuer offering group health insurance coverage shall not apply any waiting period (as defined in §2704(b)(4)) that exceeds 90 days." See Public Health Service Act (PHSA) §2708 as added by PPACA §1201. The PHSA §2704(b)(4), the Employee Retirement and Income Security Act §701(b)(4), and the Internal Revenue Code §9801(b)(4) define:

> "[T]he term 'waiting period' [to mean], with respect to a group health plan and an individual who is a potential participant or beneficiary in the plan, the period that must

[1] As indicated previously, the EFHC Coalition supports the rule outlined in Notice 2011-36, which provides that, in order to determine whether an employee was full-time during the look-back period, the employer must determine whether the employee averaged at least 30 hours of service per week or, under the rules contemplated to be included in proposed regulations, at least 130 hours of service per calendar month.

> pass with respect to the individual before the individual is eligible to be covered for benefits under the terms of the plan."

See also Notice 2011-36, highlighting the Administration's interpretation that a waiting period does not begin until an employee is otherwise eligible to enroll under the terms in a group health plan (*emphasis in original)*. Thus, a waiting period begins once a potential participant or beneficiary – whether newly hired or current – has become eligible for the plan. The EFHC Coalition strongly supports this concept as it would create a uniform rule that would be consistent with current regulation and reflect the language in PPACA.

In addition, the Coalition strongly supports the agencies' recognition that nothing in PPACA changes an employer's current ability to set reasonable plan eligibility criteria (such as an hours-of-service or upfront work requirement) and supports the agencies' recognition that a waiting period does not begin until an individual "who is a potential participant or beneficiary" has met the "terms of the plan." See PHSA §2704(b)(4).

Enrollment into the Plan

The Coalition shares the Administration's desire to ensure that employees are enrolled in the appropriate coverage for which they are eligible in a timely and workable manner. The Coalition has set forth two potential enrollment rules below that would coordinate the 90-day waiting period, the look-back/stability safe harbor to determine eligibility for employees of unknown status (as described below and outlined in a series of examples on page 6), and an employer's practical need for an administrative period to enroll employees into coverage.

A. General rule for employees not subject to a look-back

The Coalition strongly supports a reasonable administrative period to enroll participants and beneficiaries into the plan after they become eligible for benefits. This would permit time for an employee to elect coverage and for an employer to set-up any applicable pre-tax payroll deductions and enroll the employee into coverage.

The Coalition recommends that the administrative period be no less than 31 days after the end of any applicable waiting period. Coverage typically begins at the beginning of a month and coincides with a pay period to facilitate the employee's pre-tax premium payment. Consequently, common practice is to enroll an employee starting the first of the month after the end of a waiting period. This concept was initially proposed in Notice 2011-17, which suggested that plans might need "an administrative interval (for example, up to one month) between the end of the measurement period and the beginning of the stability period" to "perform the look-back calculation, notify employees of their eligibility, and enroll them in coverage."

Thus, the general rule for employees not subject to a look-back would provide that an individual's waiting period, not to exceed 90 days, begins after an individual becomes eligible for the plan, and that such individual must receive coverage for benefits no later than 31 days after the end of such waiting period.

B. Rule for employees subject to a look-back

For employers utilizing a look-back methodology to determine eligibility for employees of unknown status, it is critically important that employers be allowed to select a look-back period of up to 12 months.

Because a look-back period, similar to a waiting period, serves to demonstrate a sufficient employment connection between an employee and an employer, the 90-day waiting period could run concurrent with the look-back. ***To be expressly clear, any rule that includes a waiting period that***

runs concurrent with a look-back is viable only if an employer is allowed to elect up to a 12-month look-back period.

Thus, the rule for employees subject to a look-back would provide that coverage for employees who become eligible could be effective (i.e., coverage for benefits would begin) after the look-back ends. Employers would have up to 31 days from the end of the look-back to complete the administrative process of enrolling employees into coverage.

IV. Coordinated Reporting

As outlined in our October 31, 2011 letter and in meetings with the Administration, Coalition members have been undertaking a comprehensive analysis of the major employer reporting requirements under the law to try to understand the flow and timing of required information and the interaction between employers, insurance Exchanges, and the federal agencies in conjunction with the coverage requirements and imposition of penalties under the law.

We understand that Treasury and the IRS intend to request comments on the employer information reporting required under IRC §6056. The Coalition urges the Administration to build upon the employer reporting requirements to Treasury under IRC §6056 to create a clear and administratively workable reporting process to verify individual eligibility for premium tax credits and ultimately to assess employer tax penalties. IRC §6056 could be used to facilitate the use of a single, annual report from employers to Treasury that could include prospective general plan and wage information for the affordability test safe harbor, as well as retrospective individual full-time employee information for the look-back safe harbor.

The table below illustrates how eligibility for employer-sponsored health plans would be determined, waiting periods would be applied, and enrollment in coverage would be undertaken for six different employee statuses, as well as subsequent verification via employer reporting requirements.

EFHC Proposed Eligibility and Enrollment Examples				
Examples of employee status	Plan eligibility determination (look-back period, eligibility criteria other than waiting periods)	Waiting period prior to enrollment	Enrollment into coverage (stability period, if applicable)	Verification of employee status through annual reporting process
1. Employee designated as full time at time of hire, and employer imposes no waiting period	N/A	N/A	N/A	Employer information reporting via IRC §6056
2. Employee designated as full time at time of hire, and employer imposes a waiting period	N/A	Up to 90 days	Within 31 days of end of waiting period	Employer information reporting via IRC §6056
3. Employee promoted from part-time to full-time status, and employer imposes a waiting period	Promotion to full-time status triggers eligibility for plan	Up to 90 days	Within 31 days of end of waiting period	Employer information reporting via IRC §6056
4. Employee designated as part time at time of hire, and employer offers coverage to part-time employees and imposes a waiting period	Employer may elect to apply criteria other than waiting periods, e.g. hours of service requirement, licensure, etc. to determine eligibility for the plan	Up to 90 days	Within 31 days of end of waiting period	Employer information reporting via IRC §6056
5. Employee designated as part time at time of hire, and employer does not offer coverage to part-time workers	N/A	N/A	N/A	Employer information reporting via IRC §6056
6. Employee status unknown at time of hire, and employer offers coverage to full-time employees	Up to 12-month look-back applied to determine employee status and eligibility for the plan	Runs concurrent with look-back	Commensurate stability coverage begins at end of look-back period, enrollment process completed within 31 days	Employer information reporting via IRC §6056

V. Affordability Safe Harbor and Use of Current Wages

Notice 2012-17 proposes permitting employers to utilize prior year wages from the Form W-2 for the purposes of determining whether the employer's plan fits within the proposed affordability safe harbor in which an employee's contribution to an employer's plan cannot exceed 9.5% of wages. The EFHC Coalition supports permitting employers to use prior year wages from the form W-2 as one option for meeting the affordability safe harbor. However, as stated in our October 31, 2011 letter to Treasury and HHS, it is imperative that employers also be able to assess the affordability of coverage based on current wages paid to employees. This is particularly important for new-hires, promoted employees, previously unemployed individuals and transitional workforces in general, where prior year wages may not be known or may not reflect current wages.

The ability to use current wages would permit employers to make a prospective determination that would compare current wages to current employee premiums. Such prospective determinations are expressly contemplated in Notice 2011-73:

> "Although the determination of whether an employer actually satisfied the safe harbor would be made after the end of the calendar year, an employer could also use the safe harbor prospectively, at the beginning of the year, by structuring its plan and operations to set the employee contribution at a level so that the employee contribution for each employee would not exceed 9.5 percent of that employee's W-2 wages for that year."

However, the ability to utilize the affordability safe harbor prospectively also hinges on how the reporting requirements are structured under IRC §6056 and how the Administration issues guidance to accommodate employers who have varying plan years and do not operate on a calendar year basis. It is important to recognize that not all employers will be able to utilize the affordability safe harbor based on current wages due to the cost of their plans. These employers will fall under the general rule which states an employee's premium contribution for self-only coverage cannot exceed 9.5% of the employees' household income.

Employers for Flexibility in Health Care

We thank you for the opportunity to provide comments and look forward to continuing to work with the Administration on the development of workable regulations that maintain employer-sponsored coverage as a competitive option for all employees whether full-time, part-time, temporary, or seasonal workers.

For questions related to this letter, please contact Anne Phelps, Principal, Washington Council Ernst & Young, Ernst & Young LLP, at 202-467-8416.

Respectfully submitted by the Employers for Flexibility in Health Care Coalition and the following signatories,

7-Eleven
Aetna
Allegis Group, Inc.
American Hotel & Lodging Association
American Staffing Association
Associated Builders and Contractors, Inc.
Associated Food and Petroleum Dealers
Associated General Contractors of America
Auntie Anne's, Inc.
Brinker International
DineEquity, Inc.
Food Marketing Institute
Gap, Inc.
HR Policy Association
International Association of Amusement Parks & Attractions
International Franchise Association
Jack in the Box, Inc.
Kelly Services
Lowe's Companies, Inc.
ManpowerGroup
Michaels
National Association of Convenience Stores
National Association of Health Underwriters
National Franchisee Association
National Grocers Association
National Restaurant Association
National Retail Federation
OSi Restaurant Partners, LLC
Pep Boys
Petco Animal Supplies, Inc.
Qdoba Restaurant Corporation
Regis Corporation
Retail Industry Leaders Association
Robert Half International, Inc.
Ruby Tuesday, Inc.
Society of American Florists
Texas Roadhouse, Inc.
The Cheesecake Factory, Inc.
TrueBlue
UPS
U.S. Chamber of Commerce
Volt Workforce Solutions
Yum! Brands, Inc.
Alabama Grocers Association
Alabama Retail Association
California Restaurant Association
The Carolinas Food Industry Council
Colorado Restaurant Association
Connecticut Food Association
Florida Restaurant & Lodging Association
Georgia Restaurant Association
Idaho Lodging & Restaurant Association
Idaho Retailers Association
Illinois Restaurant Association
Illinois Retail Merchants Association
Indiana Restaurant Association
Kansas Restaurant & Hospitality Association
Kentucky Association of Convenience Stores, Inc.
Kentucky Grocers Association, Inc.
Kentucky Restaurant Association
Louisiana Restaurant Association
Louisiana Retailers Association
Maine Restaurant Association
Maryland Retailers Association
Michigan Food and Beverage Association
Retailers Association of Massachusetts
Minnesota Grocers Association
Minnesota Restaurant Association
Mississippi Hospitality & Restaurant Association
Missouri Restaurant Association
Missouri Retailers Association
Montana Food Distributors Association

Employers for Flexibility in Health Care

Nebraska Grocery Industry Association
Nebraska Retail Federation
Nevada Restaurant Association
New Hampshire Lodging & Restaurant Association
The North Carolina Retail Merchants Association
Northwest Grocery Association
Ohio Council of Retail Merchants
Ohio Restaurant Association
Pennsylvania Food Merchants Association
Pennsylvania Restaurant Association
South Carolina Hospitality Association
The South Carolina Retail Merchants Association
South Dakota Retailers Association
Tennessee Grocers & Convenience Store Association
Tennessee Hospitality Association
Texas Restaurant Association
Utah Food Industry Association
Utah Retail Merchants Association
Vermont Grocers' Association
Vermont Retail Association
Virginia Retail Federation
Washington Retail Association
Wisconsin Grocers Association
Wisconsin Restaurant Association
Wyoming Retail Association

Attachments:

Employers for Flexibility in Health Care Coalition October 31, 2011 Comment Letter re: Notice 2011-73

Employers for Flexibility in Health Care Coalition June 17, 2011 Comment Letter re: Notice 2011-36