



College and University Professional  
Association for Human Resources

June 17, 2011

VIA E-MAIL SUBMISSION:

[NOTICE.COMMENTS@IRSCOUNSEL.TREAS.GOV](mailto:NOTICE.COMMENTS@IRSCOUNSEL.TREAS.GOV)

Ms. Mireille Khoury  
Associate Chief Counsel  
Office of Division Counsel  
Internal Revenue Service  
U.S. Department of the Treasury

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

Dear Ms. Khoury,

The Society for Human Resource Management (SHRM) and the College and University Professional Association for Human Resources (CUPA-HR) are pleased to submit the following comments in response to Notice 2011-36 issued by the U.S. Department of the Treasury and the Internal Revenue Service (Agencies) and released May 3, 2011, for comments regarding issues under the “employer shared responsibility” provisions of section 4980H of the Internal Revenue Code (Code) as added by the Patient Protection and Affordable Care Act, as amended (ACA). SHRM and CUPA-HR look forward to working with the Agencies to craft workable implementing regulations.

SHRM is the world's largest association devoted to human resource management. Representing more than 250,000 members in over 140 countries, the Society serves the needs of HR professionals and advances the interests of the HR profession. Founded in 1948, SHRM has more than 575 affiliated chapters within the United States and subsidiary offices in China and India.

CUPA-HR serves as the voice of human resources in higher education, representing more than 13,000 HR professionals at over 1,700 colleges and universities across the country, including close to 90 percent of all U.S. doctoral institutions, 70 percent of all master's institutions, more than half of all bachelor's institutions and almost 500 two-year and specialized institutions. Higher education employs 3.3 million workers nationwide, with colleges and universities in all 50 states.

We respectfully submit these comments in an effort to increase the Agencies' understanding of the practical circumstances faced by SHRM and CUPA-HR members who administer both insured and self-insured health care plans. These comments are intended to assist the Agencies in crafting guidance which promotes the ACA goal of promoting expanded, affordable coverage, while taking into account the real world difficulties and expense of applying the shared responsibility requirements (and related provisions, such as automatic enrollment) in a variety of industries, geographies, and workforce demographics, faced with increasing cost pressures and resource constraints. We also recognize and encourage the Agencies' intent to develop regulations in concert with the Departments of Labor and Health and Human Services.

## **INTRODUCTION**

The employer shared responsibility requirements of Code section 4980H are intended to promote expanded affordable health coverage, and to work in conjunction with other provisions such as automatic enrollment, individual shared responsibility, income-based premium subsidies (Code section 36B), and state insurance exchanges. The employer shared responsibility provision requires certain employers to offer their full-time employees (and dependents) coverage meeting prescribed standards, or pay a penalty. Notice 2011-36 specifically requests comments on issues pertaining to the definition of full-time employee for purposes of the shared responsibility provisions of section 4980H. The notice also solicits comments on interpretation of the 90-day limitation on waiting periods, and coordination with the auto-enrollment rules under section 18A of the Fair Labor Standards Act.

The definition of full-time employee is vital to employers' implementation efforts around several elements of section 4980H:

- Whether an employer is an “applicable large employer” subject to 4980H;
- Whether an employer offers coverage to its full-time employees and is therefore subject to potential penalties under 4980H(a) or (b); and
- Calculating an employer's liability for section 4980H(a) or (b) penalties.

## **DEFINITION OF EMPLOYER**

The Notice uses the common law-test of the employer-employee relationship and would also, pursuant to 4980H(c)(2)(C)(i), treat as a single employer all entities treated as a single

employer under sections 414(b), (c), (m), or (o). The statute appears to limit this definition to determining whether the employer is a large employer subject to 4980H, and to applying the rule excluding the first 30 full-time employees from some penalty determinations.

SHRM and CUPA-HR urge the Agencies to retain the aggregated employer definition for the limited purposes it is used in the statute, and not to extend this definition to counting hours or determining whether an employer is subject to section 4980H(a) and/or (b), or for calculating penalties. To do otherwise could cause significant recordkeeping and potentially unfair penalty calculations for employers, particularly those whose employees work for different entities within the controlled group during different times of the year – and where one employer within the controlled group offers different health care coverage than other employers within the controlled group. This situation could arise for a controlled group which has different businesses employing different types of workers, such as a controlled group that includes one employer that is an engineering firm and another employer that is a commercial cleaning service. The two firms must attract and retain different workforces, in different geographic areas, and may not even have the same types of coverage available from insurance carriers. Another example is in the university context, where faculty and administrative staff at one campus are offered one benefit package and employees of an affiliated research station in another state that operates only four months a year are offered another benefit package.

## **DEFINITION OF EMPLOYEE**

The proposal to define “employee” using the common-law test is sensible. However, for purposes of section 4980H, some individuals who might meet that test should be exempt from consideration as employees because including them could create practical difficulties and would not further the public policy goal of expanding access to affordable coverage. Failing to provide exceptions for certain employee populations would pose problems for employers if they had to assess those groups for full-time status, such as:

- Minor dependents under age 18. These individuals will likely never be eligible for premium subsidies and employers should not incur penalties for not offering coverage to these individuals, as they would likely have access to coverage through their parents.
- Employees covered under health plans of another family member, through a student health plan or through another employer. Employers choosing not to offer coverage and therefore subject to penalties under 4980H(a) should not incur penalties for employees who choose to obtain coverage through another family member, through a student health plan or who have coverage through another employer.
- Student employees. Student employees under the Fair Labor Standards Act should be excluded if the individual’s primary purpose for affiliation with the organization is as a student rather than to be employed – and their employment is incidental to their role as a student.

- Seasonal employees. Although seasonal employees (working 120 days or fewer during the calendar year) are excluded from the determination of whether an employer is subject to 4980H at the outset, the statute does not exclude them from the definition of full-time employee for purposes of determining whether the employer is subject to 4980H(a) or (b), nor for calculating the amount of the assessable penalty under either subsection. The Agencies acknowledge the practical issues with determining whether seasonal employees must be considered full-time employees. Rather than subjecting employers to burdensome administrative requirements, a more workable rule would allow employers to completely exclude from the definition of full-time employee, seasonal employees working 120 days or fewer during the calendar year.
- Part-year employees of schools and higher education institutions. In academic settings, schoolteachers and some university employees only work nine months of the year. We urge the Agencies to craft a special rule for determining whether these employees should be considered full-time employees: a full-time equivalency should be at least 75% for at least one semester, which may run 140 days.
- Non-resident aliens.
- Independent contractors. This exclusion should extend to those individuals treated as independent contractors under the safe harbor available to employers for employment tax

purposes.

## **DEFINITION OF HOURS OF SERVICE/CALCULATING HOURS OF SERVICE**

The Agencies suggest that the proposed regulations would treat 130 hours of service in a calendar month as the monthly equivalent of at least 30 hours of service per week. This monthly equivalent correctly reflects that the average month consists of more than four weeks, and SHRM and CUPA-HR support this flexibility in the proposed regulations.

We also encourage the Agencies to consider a “pay period” standard since many employers determine employee hours of service on a pay period basis, rather than a weekly or monthly basis, and this approach would simplify employer administration and recordkeeping. Employers that maintain records on a pay period basis would face significant new administrative burdens if they had to calculate hours of service based on weeks or months.

The other equivalency approaches to calculating hours of service for non-hourly employees are consistent with how many employers already calculate service for retirement plan purposes, but SHRM and CUPA-HR recommend that these equivalencies be considered a safe harbor rather than a required method. We support the proposal that using different methods for different classifications would be acceptable for purposes of 4980H and that employers could change equivalency methods.

## **LOOKBACK/STABILITY SAFE HARBOR APPROACH TO DETERMINING FULL-TIME EMPLOYEES**

The Notice correctly suggests that the shared responsibility provisions raise different concerns for employers in different industries, and acknowledges the need for flexible and workable rules. In proposing the lookback/stability method, the Notice offers one possible safe harbor, but we also urge the Agencies to allow employers to use a “regularly scheduled to work” approach to determining full-time employee status for purposes of 4980H(a) and (b) – such an approach could help certain employers avoid the administrative burden raised by a lookback/stability approach. We also encourage the Agencies to consider crafting a transition approach to implementing the 4980H rules, given the expected changed health care landscape in 2014. In particular, employers should not have to invest significant dollars in determining full-time employees until the processes with state exchanges and other marketplace changes are fully operational.

In addition, with respect to the lookback/stability approach, SHRM and CUPA-HR suggest the following.

- Employers should be able to designate the number of months in the lookback period ranging from 3 to 12 consecutive months. Because employers record time differently, and vary widely in the systems they use to track and report hours, a single lookback period set in regulations would be unworkable and eliminate the safe harbor for many employers.

- It is absolutely essential to allow employers to use different measurement and stability periods for different classifications of employees or for different entities within a group of affiliated employers. For example, employees of CUPA-HR members may work one or two semesters, or a full calendar year, and it will be important to preserve the flexibility to use different lookback and stability periods for these different classes of employees.
- While allowing different measurement and stability periods for different classifications of employees or for different entities may appear to make it more difficult for IRS to review and confirm employer compliance, or increase the potential for manipulation, the added employer cost and administrative burden resulting from changing payroll systems (e.g., getting all to the same pay period), plan years, human resource processes (e.g., systems for eligibility notices), increased COBRA claims, and administrative costs due to more individuals being eligible for and then losing coverage, and other factors, could greatly outweigh the potential benefits of requiring single measurement and stability periods across controlled groups. Instead, SHRM and CUPA-HR recommend that the Agencies adopt a good faith standard for compliance with the lookback/stability safe harbor or any other method adopted by an employer under 4980H to determine full-time employees.
- Employers need an adequate period of time between the end of the measurement period and the beginning of the stability period to perform the lookback calculation, notify employees of eligibility, and enroll them in coverage. One approach to this challenge might be to allow the stability period to begin with the start of the next plan year, so that communications about eligibility and plan coverages can be aligned with regular plan

communications schedules, thus allowing employers to allocate resources to actual health coverage and other important endeavors rather than to administrative activities. This approach would also stabilize plan coverage populations, allowing employers (and state exchanges, including insurers participating in them) to better predict and budget for health plan costs. Another possibility is to allow a period of up to three months to accommodate the necessary tasks to calculate, notify and enroll (subject to waiting periods, as discussed below). We believe that one month is not an adequate amount of time to perform these tasks, and is not required by either 4980H or section 18A of FLSA, the automatic enrollment rule.

#### **PENALTIES UNDER SECTION 4980H(a)**

The Notice states that it is contemplated that the proposed regulations would make clear that an employer offering coverage to all, or substantially all, of its full-time employees would not be subject to the 4980H(a) assessable payment provisions. This would be a welcome interpretation, and would allow for appropriate exceptions so that an employer would be considered to offer coverage to substantially all of its full-time employees. As discussed above, employers face particular challenges covering certain employee populations including:

- Minor dependents;
- Students;
- Employees covered under a Taft-Hartley (multi-employer) fund;

- Nonresident aliens;
- Seasonal employees;
- Employees with other coverage (e.g., through family member, a public program, or another employer); and
- Employees of an acquired company for a period of time (it is not uncommon for a buyer of a company to require several months or even years to harmonize benefits, and in some cases, buyers may be required, or may choose to preserve benefits for an acquired group by leaving them in the seller's plan, for example).

Most of these individuals will have minimum essential coverage available through other means, will not be required to carry minimum essential coverage under ACA, or will be eligible to purchase such coverage in state exchanges. Requiring coverage or subjecting an employer to penalties based on their total number of full-time employees because they do not offer coverage to individuals in one of these categories will disturb staffing models that are based on sound business reasons, and does not further the goal of encouraging employers to continue to provide coverage to substantially all of their full-time employees.

## **90 DAY WAITING PERIOD**

Under HIPAA regulations, a waiting period does not begin until an employee or dependent is otherwise eligible to enroll under the terms of the plan. This means that an employee must first satisfy any other applicable eligibility requirements, including working a minimum hours of

service, working a minimum number of weeks during which the employee works a minimum number of hours, belonging to a particular class of employees, or, for certain plans, engaging in certain wellness activities as otherwise permitted. Similarly, many insurers and employers begin health plan coverage for employees on the first day of a month after the employee satisfies eligibility requirements, or performs service for a certain amount of time from the date of hire. Plans and insurers commonly preclude mid-month enrollment. SHRM and CUPA-HR believe that in interpreting the 90 day waiting period limitation under PHSA 2708 the Agencies should:

1. Keep the HIPAA definition of a waiting period that begins once an employee or dependent has satisfied the plan's eligibility requirements (e.g., minimum period of service, probationary period, employee classification).
2. Allow coverage to begin at the first of the month following a 90 day waiting period. This approach would be consistent with current practice, avoid additional costs associated with mid-month enrollments, and cause less confusion for employees who might gain employer plan eligibility and thus lose eligibility for public programs such as Medicaid or CHIP, or who had been enrolled in exchange coverage which will presumably run on a monthly basis. Moreover, concern over auto-enrollment and its impact on eligibility for other plans suggests that while employers must enroll full-time employees in coverage, ample time is needed for employees to receive and understand information about what's available, how to opt-out, costs, etc.

## CONCLUSION

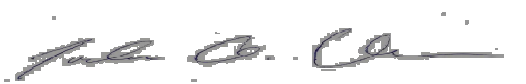
SHRM and its members, and CUPA-HR and its members, appreciate the Agencies' efforts to solicit and consider employer input as they develop regulations and other guidance to implement ACA's provisions. Employers will need significant advance time to implement tactical requirements, such as new systems to track service, offer benefits, and coordinate with exchanges. At the same time, employers need significant advance time to develop appropriate strategies based on well-crafted, final rules that have had ample opportunity for stakeholder input. We encourage the Agencies to recognize the practical implications of implementation, and not to create requirements that could result in diminished coverage or strategies that might affect workforce planning and management. Accordingly, SHRM and CUPA-HR respectfully urge the Agencies to pursue a transparent process for proposing and finalizing regulations and other guidance, recognizing the significant changes for employers, employees, insurers, and state Agencies such as exchanges, as all work to implement and comply with ACA.

We welcome the opportunity to assist the Agencies as they continue to develop guidance on ACA.

Respectfully submitted,



Michael P. Aitken  
Director, Government Affairs



Joshua A. Ulman  
Chief Government Relations Officer

Society for Human Resource Management

The College and University Professional  
Association for Human Resources