



August 11, 2010

VIA ELECTRONIC MAIL: <http://www.regulations.gov>

Office of Health Plan Standards and Compliance Assistance  
Employee Benefits Security Administration  
Room N-5653  
U.S. Department of Labor  
200 Constitution Avenue, N.W.  
Washington, DC 20210

**Re: RIN 1210-AB41  
Comments on the Interim Final Rules for Group Health Plans and Health Insurance Issuers Relating to Dependent Coverage of Children to Age 26 Under the Patient Protection and Affordable Care Act 75 Fed. Reg. 27122 (May 13, 2010)**

This letter responds to the request for comments by the U.S. Departments of Health and Human Services, Labor and the Treasury (Agencies) regarding the May 13, 2010, Interim Final Rules (Rules) for Group Health Plans and Health Insurance Issuers Relating to Dependent Coverage of Children to Age 26 Under the Patient Protection and Affordable Care Act (PPACA). These comments are submitted by the Society for Human Resource Management (SHRM).

SHRM is the world's largest association devoted to human resource (HR) management. Representing more than 250,000 members in over 140 countries, SHRM 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.

SHRM members provide both insured and self-insured health benefit plans to employees and family members, and have extensive knowledge and experience with such programs. These comments are intended to assist the Agencies in understanding the issues that may arise under these Rules and to make some suggested changes.

SHRM respectfully submits the following comments to the Rules in the following areas:

- Definition of a Child
- Inapplicability to Retiree-Only Plans
- Enrollment Periods that Coincide with Open Enrollment
- Small Organizations

## **I. Definition of a Child**

The Internal Revenue Service (IRS) released Notice 2010-38 on April 27, 2010 to provide guidance on the tax treatment of health coverage provided to adult children under age 27. Notice 2010-28 provides that for purposes of the tax treatment, the IRS is using the definition of a child contained in Code section 152(f)(1). Under Section 152(f)(1), a child is an individual who is the son, daughter, stepson, or stepdaughter of the employee, and also includes both legally adopted individuals of the employee and individuals who are lawfully placed with the employee for legal adoption and legally placed foster children.

The Rules, in defining coverage requirements, do not contain a similar definition of a child. The Rules do, however, allow plans to determine eligibility based on the relationship between a child and the participant, which would seem to allow a plan to follow the definition in Code section 152(f)(1). However, it is unclear whether a plan that prior to the law voluntarily covered individuals (such as nieces and nephews) who do not fall under the Code section 152(f)(1) definition of a child would have to now cover those individuals to age 26. To provide clarity and consistency on this issue, SHRM requests that the Agencies follow the definition of a child in Code section 152(f)(1).

## **II. Inapplicability to Retiree-Only Plans**

When the Rules were released in May, neither the preamble nor the regulatory text addressed the issue of whether retiree-only plans that cover dependents would also be required to offer coverage to children up to age 26. It was not until the interim final regulations addressing grandfathered health plan status were issued a few weeks later that the issue of whether the PPACA group market reforms apply to retiree-only plans was addressed. The preamble to the grandfather rule states that retiree-only plans that cover less than two participants who are current employees are not subject to the PPACA group market reforms added to Part 7 of ERISA. This was subsequently confirmed on June 28 when the Agencies released the interim final regulation implementing the PPACA patient's bill of rights.

Because the requirement to provide coverage to adult children to age 26 was added to Part 7 of ERISA, it follows that this provision does not apply to retiree-only plans. SHRM requests that the Agencies confirm and clarify that this adult child coverage requirement under section 2714 of the PPACA does not apply to retiree-only plans with less than two participants who are current employees.

## **III. Enrollment Periods that Coincide with Open Enrollment**

The Rules provide transitional relief for a child whose coverage ended, or who was denied coverage (or was not eligible for coverage) under a group health plan or health insurance coverage because, under the terms of the plan or coverage, the availability of dependent coverage of children ended before the attainment of age 26. The Rules require a plan or issuer to give such a child an

opportunity to enroll that continues for at least 30 days (including written notice of the opportunity to enroll) but also allow plans to use their existing annual open enrollment period to satisfy this enrollment opportunity requirement.

Most plans operate on a calendar year basis, meaning that open enrollment will begin in the fall of 2010 for the plan year beginning January 1, 2011. Any plan changes, including compliance with the PPACA provisions will be communicated to employees well in advance of the start of open enrollment. This provides employees with the opportunity to ask any questions about their benefits as well as make any determinations regarding the benefits they plan to enroll in for the following year, whether it be flexible spending arrangement contribution amounts, the addition of life insurance benefits, or any other changes made each year. SHRM believes that because benefit changes are communicated well in advance of the start of open enrollment, employees will have ample time to decide whether to elect coverage for their adult children, whether those children are eligible for coverage and which parent's plan to enroll the child in if the spouse has employer-provided coverage as well. Therefore, the 30-day open enrollment period places an undue administrative burden on plan sponsors and does not convey a significant benefit to the employee or adult children.

For those plans that provide the transitional enrollment opportunity in conjunction with their existing annual open enrollment period, SHRM suggests that the enrollment period be no longer than the regular open enrollment period.

#### **IV. COBRA Coverage Considered “Other Employer Coverage”**

The statute and Rules provide that for plan years beginning before January 1, 2014, a group health plan that maintains grandfathered health plan status may exclude an adult child who has not attained age 26 if the child is eligible to enroll in an employer-sponsored health plan other than the group health plan of the parent. Although the Rules address the situation where the adult child “ages out” of eligibility under his/her parent's plan and then elects COBRA coverage, the Rules do not address the situation where an adult child under age 26 is eligible for COBRA through his/her own former employer.

In the latter situation, SHRM requests that the Agencies clarify that if an adult child under age 26 is eligible for COBRA through his/her own former employer, a grandfathered health plan may exclude the adult child from coverage under his/her parents' plan until he/she exhausts COBRA. This clarification would be consistent with the HIPAA special enrollment rules that provide a special enrollment right only to COBRA enrollees who exhaust their COBRA coverage.

#### **V. Small Organizations**

According to the preamble, because the Rules are exempt from the Administrative Procedures Act, the Regulatory Flexibility Act does not apply and the Agencies are not required to either certify that the regulations would not have a significant economic impact on a substantial

number of small entities or conduct a regulatory flexibility analysis. However, the Agencies encourage public comments that suggest alternative rules that accomplish the stated purpose of section 2714 of the PPACA and minimize the impact on small entities.

SHRM appreciates the Agencies' recognition that small entities can be significantly affected by law changes that may not similarly affect larger entities. SHRM notes, however, that small employers may not have the resources to engage in this undertaking at the same time that they are also trying to absorb and understand the many changes made by the PPACA as well as the regulations that have been issued to date implementing the new law. SHRM therefore suggests that the Agencies consider other ways of encouraging small entities to provide input and a reasonable time frame in which to do so, which may be longer than would be required for larger entities.

In closing, SHRM and its members appreciate the Agencies' efforts to issue guidance on this important provision in a timely manner. We appreciate the opportunity to assist the Agencies in continuing to develop guidance on this important issue. If you wish to discuss any aspect of these comments, please contact Nancy Hammer at (703) 535-6030.

Respectfully submitted,



Nancy Hammer  
Governmental Affairs  
Society for Human Resource Management