



August 11, 2010

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

Attention: RIN 1210-AB41

Re: Definition of "Child" in Interim Final Rules for Group Health Plans and Health Insurance Issuers Relating to Dependent Coverage of Children to Age 26

Dear Sir or Madam:

As a follow-up to the letter submitted by the American Benefits Council ("Council") on June 28, 2010¹, we are writing on behalf of the Council and HR Policy Association ("HR Policy") to request additional guidance in connection with 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 of 2010, Pub. L. 111-148 ("PPACA") (the "Interim Final Rules"). It is our understanding that these comments will be shared with the Departments of Treasury and Health and Human Services.

The Council is a public policy organization representing principally Fortune 500 companies and other organizations that assist employers of all sizes in providing benefits to employees. Collectively, the Council's members either sponsor directly or provide services to retirement and health plans that cover more than 100 million Americans.

¹ On June 28, 2010, the Council submitted a letter to the Departments of Health and Human Services, Labor and Treasury with respect to the new adult child requirement as set forth in new Public Health Service Act ("PHSA") section 2714, as added by section 1001 of the Patient Protection and Affordable Care Act of 2010 ("PPACA"), Pub. L. 111-148 (enacted on March 23, 2010).

HR Policy represents the chief human resource officers of over 300 of the largest employers doing business in the United States. Representing every major industrial sector, HR Policy's members employ more than 18 million people worldwide and collectively spend more than \$75 billion annually providing health insurance to millions of American employees, their dependents and retirees.

At the outset, we note that clarifying guidance regarding the items discussed below is needed urgently. Many employers and issuers are in the process of making final decisions with respect to their plans for the upcoming plan year. This is because, for those who sponsor and/or administer calendar year plans, they must begin printing the necessary materials for annual open enrollment, which frequently occurs in October preceding the start of the plan year. Accordingly, we request that any clarifying guidance be issued as soon as possible to allow those employers and issuers that have not already finalized their plan terms for the upcoming plan year, to utilize the guidance for purposes of the upcoming plan year.

Definition of "Adult Child" Should Be Consistent with Internal Revenue Code 152(f)(1)

As stated in the Council's June 28, 2010 letter, we urge the Departments of Health and Human Services, Labor and Treasury (collectively, the "Agencies") to issue guidance providing an express definition of "child" for purposes of the Interim Final Rules and new section 2714 of the Public Health Service Act ("PHSA") (as added by PPACA). The Interim Final Rules and new PHSA section 2714 generally provide that a plan or issuer that makes available dependent coverage of children must make such coverage available for children until attainment of age 26 (the "Adult Child Requirement"). Specifically, we request guidance clarifying that the terms "child" and "children" as used in new PHSA section 2714 and the Interim Final Rules have the same meaning as the term "child" in section 152(f)(1) of the Internal Revenue Code of 1986, as amended (the "Code").

The Council and HR Policy request that the Agencies define "child" for the purposes of the Adult Child Requirement to mean the employee's legal child (by adoption or birth, foster child, or step-child) as set forth in Code section 152(f)(1). As discussed in the Council's June 28, 2010 letter, many plan sponsors make coverage available to an employee's custodial children and/or grandchildren residing with the employee. This includes, most notably, minors for whom the employee is not the legal parent but otherwise acts as the custodian either in accordance with a court appointed legal guardianship or as defined by applicable plan terms. For example, plans may cover an employee's nieces or nephews or other non-152(f)(1) children who live with the employee and receive some specified amount of financial support from the employee. As discussed in more detail below, without clarification that "child" is defined under 152(f)(1), employers that offer coverage to non-152(f)(1) individuals would seem to be required to continue to offer such coverage until the individual turns 26, regardless of

whether that individual continues to meet eligibility requirements under the plan. In addition, it would seem to be the case that the cost of the health benefits offered to at least some non-152(f)(1) individuals would need to be imputed as additional wages to the employee. Unless additional guidance is issued defining “child” as requested by the Council and HR Policy, there is a very real likelihood that plans and issuers will cease offering coverage to other non-152(f)(1) children.

Our proposal is completely consistent with congressional intent. As discussed in the Council’s June 28, 2010 letter, legislative history quite clearly indicates that Congress intended for a Code section 152(f)(1) definition of “child” to apply for purposes of the Adult Child Requirement. Specifically, as part of the Health Care and Education Reconciliation Act of 2010, Pub. L. 111-152 (the “Reconciliation Bill”), Congress added a tax “fix” to Code section 105 to address the taxation of adult child coverage. In doing so, Congress expressly defined “adult child” for this purpose by reference to Code section 152(f)(1). This was done following the Senate’s passage of PPACA, including section 1001 (which includes the new Adult Child Requirement). Accordingly, our proposed rule would give full faith to congressional intent by imposing a Code section 152(f)(1) definition of “child” for purposes of the Adult Child Requirement.

Alternative Approach has Significant Drawbacks

With respect to non-152(f)(1) children, some have suggested that an appropriate solution would be to permit plan sponsors to define eligibility for “dependent” coverage based on factors in addition to “relationship”, such as financial dependency, shared domicile, and/or custodial status. For example, a plan could offer coverage for grandchildren of employees to the extent they live with the employee and receive over half of their financial support from the employee. Thus, according to its terms, the plan would not be required to extend coverage to all grandchildren without regard to whether a grandchild satisfied the shared domicile and financial support tests. However, under this approach, the plan would be required to continue to provide coverage to any individual who enrolled in coverage through age 25, even if the individual ceases to qualify under the applicable “dependent” definition following the commencement of coverage.

Although the Council and HR Policy believe that this alternative approach is a well-intentioned attempt to address the concerns employers are facing with respect to the voluntary coverage they provide for non-152(f)(1) children, we believe the approach also has some very significant drawbacks that are likely to decrease the number of employers who offer coverage voluntarily to non-152(f)(1) children residing with their employees. Such a reduction in coverage surely would be an undesirable and unintended consequence.

Under this alternative approach, plan sponsors would be required to provide coverage to non-152(f)(1) children who may have little to no nexus with respect to the employee.

This is because, as contemplated, plans would be required to continue to make coverage available to a child until his or her 26th birthday, even where he or she ceases to satisfy the definition that applied for purposes of determining initial eligibility (*e.g.*, a child no longer qualifies as a custodial child of the employee because he or she no longer lives at home or is a financial dependent of the employee). The reasons for plan sponsors offering coverage to non-152(f)(1) children are simply not served where the individual ceases to have a sufficient nexus with the employee. Moreover, as noted in the Council's June 28, 2010 letter, most employers, especially given the current economic climate, cannot afford to offer coverage to non-152(f)(1) children without regard to some sort of dependency test or other eligibility requirement.

Another significant drawback to the approach described above is that plans will, in many instances, have to impute as wages to the employee the cost of employer-provided coverage attributable to a non-152(f)(1) child. This is because, under the proposed approach, a plan could not limit coverage to non-152(f)(1) children to the extent they qualify for tax-free employer-paid health coverage in accordance with Code sections 105 and 106.

As you know, the process of imputing as wages the value of employer-paid health coverage is no simple task. It is complicated and, as a result, can be very costly to administer. Many of our members' plans currently offer domestic partner coverage, and thus are already dealing with the issue of imputation because of the current federal income and payroll tax rules that apply to employer-paid coverage for nondependent same-sex spouses and domestic partners. As such, our members generally are uninterested in expanding the class of enrollees for which they must impute as wages the value of employer-paid coverage. As history has shown with respect to the provision of nondependent domestic partner coverage, the employee relations issues and the costs associated with educating a workforce regarding the taxation of nondependent coverage can be substantial. For many small to mid-size employers, these costs are likely to be so significant as to operate as a strict bar against providing coverage. Lastly, it is important to note that there is an added cost to employers in the form of an additional payroll tax burden because the value of imputed coverage operates not only to increase the employee's income and payroll tax liability, but also the employer's payroll tax liability.

For the reasons set forth above, the Council and HR Policy continue to believe that the best rule — both from a policy perspective and for purposes of satisfying congressional intent — is that a "child" for purposes of the Adult Child Requirement should be defined by reference to Code section 152(f)(1). Such a rule would foster increased coverage by allowing an employee's Code section 152(f)(1) children to have continued access to coverage through age 25. Moreover, such a rule would continue to encourage employers to offer coverage to non-152(f)(1) children, consistent with employers' current practices.

Provide a Safe Harbor Rule for Coverage Based on Legal Guardianship

As discussed above, many plans choose to voluntarily extend coverage to one or more classes of non-152(f)(1) children. Regardless of whether the Agencies adopt either of the approaches discussed above, the Council and HR Policy urge the Agencies to adopt a rule that would permit plans to continue to make coverage to one or more classes of non-Code section 152(f)(1) children, but only to the extent such children are subject to a court appointed legal guardianship. Thus, under such a rule, a plan could continue to make coverage available to employees' minor-age grandchildren where the employee is the legal guardian of the minor-age grandchild. Furthermore, under the requested rule, to the extent that an employee ceases to be the legal guardian with respect to the minor-age individual, or such individual attains a specified age of maturity as defined under the plan or applicable law (*e.g.*, age 19), the plan could decide to no longer make coverage available with respect to such individual.

Cost of Coverage for an “Adult Child”

Many of our members are concerned that the costs associated with insuring the health risks associated with an adult child may be significantly increased relative to those of (i) minor-age children, or (ii) the covered lives of the plan as a whole. The concern arises out of potential anti-selection issues associated with extending coverage to “adult children”. To ensure that the costs of the Adult Child Requirement are not borne fully by plan sponsors and/or the plan as a whole, the Council and HR Policy urge the Agencies to issue guidance permitting plans to charge an additional premium equal to any increased actuarial risk assumed by the plan with respect to covering an adult child.

Clarification Needed Regarding What Constitutes Qualifying “Other Employer-Sponsored Coverage” for Purposes of the Pre-2014 Transition Rule

PPACA section 1251, as amended by the Reconciliation Bill, provides a special transition rule for grandfathered plans. Per this special transition rule, grandfathered plans are not required to make coverage available to a qualifying adult child if such child is “eligible to enroll in an eligible employer-sponsored health plan ... other than a group health plan of a parent.” Clarification is needed regarding what constitutes an “eligible employer-sponsored health plan” for purposes of the transition rule.

The Council and HR Policy request clarification that employer-sponsored continuation coverage that is made available to an otherwise qualifying adult child – whether by reason of state or federal law (*e.g.*, COBRA coverage), or at the voluntary election of the adult child’s former employer – constitutes “eligible employer-sponsored health plan” coverage. There is no valid policy justification for distinguishing between active coverage and continuation coverage; accordingly, the Council and HR Policy request

clarification that employer-sponsored continuation coverage qualifies as an “eligible employer-sponsored health plan” for purposes of the transition rule.

Additionally, the Council and HR Policy request clarification that an “eligible employer-sponsored health plan” also includes employer-sponsored coverage that is available to an otherwise qualifying adult child vis-à-vis the adult child’s spouse. For example, to the extent that an adult child has access to health coverage through his or her spouse’s employer, this coverage should qualify as an “eligible employer-sponsored health plan” for purposes of the transition rule.

Conclusion

We appreciate the opportunity to comment on the Interim Final Regulations. If we can be of further assistance, please contact Kathryn Wilber at 202-289-6700 or kwilber@abcstaff.org, or Marisa Milton at 202-789-8671 or mmilton@hrpolicy.org.

Sincerely,



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