

# Employers for Flexibility in Health Care

April 5, 2012

Submitted electronically via: [e-ohpsca-er.ebsa@dol.gov](mailto: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;

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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.

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## 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.<sup>1</sup>

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

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<sup>1</sup> 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.

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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***

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*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.

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<b>EFHC Proposed Eligibility and Enrollment Examples</b>				
<b>Examples of employee status</b>	<b>Plan eligibility determination (look-back period, eligibility criteria other than waiting periods)</b>	<b>Waiting period prior to enrollment</b>	<b>Enrollment into coverage (stability period, if applicable)</b>	<b>Verification of employee status through annual reporting process</b>
<b>1. Employee designated as full time at time of hire, and employer imposes no waiting period</b>	N/A	N/A	N/A	Employer information reporting via IRC §6056
<b>2. Employee designated as full time at time of hire, and employer imposes a waiting period</b>	N/A	Up to 90 days	Within 31 days of end of waiting period	Employer information reporting via IRC §6056
<b>3. Employee promoted from part-time to full-time status, and employer imposes a waiting period</b>	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
<b>4. Employee designated as part time at time of hire, and employer offers coverage to part-time employees and imposes a waiting period</b>	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
<b>5. Employee designated as part time at time of hire, and employer does not offer coverage to part-time workers</b>	N/A	N/A	N/A	Employer information reporting via IRC §6056
<b>6. Employee status unknown at time of hire, and employer offers coverage to full-time employees</b>	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

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## 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.

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

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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

# Employers for Flexibility in Health Care

June 17, 2011

*Submitted electronically via e-mail to notice.comments@irs.counsel.treas.gov.*

Internal Revenue Service  
Attn: CC:PA:LPD:PR (Notice 2011-36)  
Room 5203  
P.O. Box 7604  
Ben Franklin Station  
Washington, DC 20044

## **RE: Request for Comments on Shared Responsibility for Employers Regarding Health Coverage (IRC §4980H, as created by PPACA §1513)**

We are writing in response to Notice 2011-36 on behalf of the Employers for Flexibility in Health Care ("EFHC"), a coalition 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 look forward to working with the Administration as it implements 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.

The Coalition represents employers who create millions of jobs each year, employ a significant workforce in the US, offer flexible working environments for employees, and are a leading contributor to the nation's economic job recovery. Some examples include:

- The retail industry employs one of every five workers today, representing one of the largest industry sectors in the United States and a vital mainstay of our economy;
- The restaurant industry is the second-largest private-sector employer in the nation with about 12.8 million employees;
- Temporary staffing firms provide a wide range of temporary and contract staffing services in virtually every job category and employ approximately 2.6 million temporary and contract workers every day and almost 10 million workers annually;
- There are more than 36,000 supermarkets in the United States employing 3.4 million people;
- There are nearly 825,000 franchised businesses across 300 different business lines creating 18 million jobs; and
- The construction industry's employment exceeds 5.5 million jobs.

The EFHC Coalition appreciates the opportunity to share our thoughts with the Administration on provisions of PPACA that affect employers. The definition of full-time employee is of particular importance to us 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. As such, we appreciate the Notice's recognition that:

*"A determination of full-time employee status on a monthly basis for purposes of calculating an employer's potential §4980H liability may cause practical difficulties for employers, employees, and the State Exchanges. These difficulties include uncertainty and inability to predictably identify which employees are considered full-time and, consequently, inability to forecast or avoid potential §4980H liability."*

The EFHC Coalition broadly supports the proposed "look-back/stability period safe harbor method" for determining which employees would be considered full time for a particular coverage period. We believe this methodology would help employers provide a stable source of coverage for employees and

- as noted on page 14 of the Notice - has the potential to reduce churn between employer and Exchange coverage, thereby minimizing disruption of employees' coverage, access to providers and annual benefits. Moreover, we strongly concur with the Administration that this approach is more workable than monthly determinations of employees' eligibility for coverage and employers' liability for tax penalties (Internal Revenue Code (IRC) §4980H, as created by PPACA §1513).

On behalf of the Coalition, we will use this letter to:

- I) Provide general comments on the proposed look-back/stability period safe harbor method to determine who is a full-time employee and its relationship to the calculation of tax penalties under the employer shared responsibility provision (IRC §4980H, as created by PPACA §1513); and
- II) Raise additional specific questions that we ask you to consider as you draft guidance and regulations on state health insurance Exchanges, the determination of whether employer benefits are affordable, and the imposition of tax penalties.

The Coalition greatly appreciates Treasury's suggested look-back/stability period safe harbor interpretation of the statute and believes that the look-back/stability period has the potential to provide the flexibility employers need to preserve flexible work arrangements, provide a stable source of coverage, and allow for the practical administration of benefits. Because our coalition members have workforces with high turnover rates and fluctuating work schedules, it is imperative that employees become eligible for coverage only after meeting a plan's eligibility requirements, as established by the employer, including a look-back period (or probationary period), and followed by a 90-day wait period.

Further, as you draft upcoming regulations with respect to state health insurance Exchanges, the determination of whether employer benefits are affordable, and the imposition of tax penalties under the employer shared responsibility provisions, we urge you to use the regulatory process to create rules for employers that allow for practical and workable administration of employer benefits, predictability of penalties, and uniform and consistent reporting requirements.

**I. GENERAL COMMENTS ON POTENTIAL METHODS FOR DETERMINING FULL-TIME EMPLOYEES UNDER 4980H**

**A. Definition of Full-time Employee Under the "Look-back" Methodology**

As the Administration develops further guidance on the definition of full-time employee, we offer the recommendations listed below.

1. *Employers should be granted flexibility to utilize the look-back period for new part-time, temporary, and seasonal hires.* Of primary importance to employers with variable workforces is the treatment of new and newly eligible employees, as our workforce fluctuates on an ongoing basis throughout a given year with new employees entering our systems sometimes on a daily basis. Notice 2011-36 indicates that the Department is considering applying the proposed safe harbor "only in a limited form" for such employees. A limited application for newly hired employees would be extremely problematic for employers with variable workforces. Employers with variable workforces must be able to utilize the look-back period primarily in the first year of an employee's service to determine whether the employee has worked sufficient hours to reach full-time status and become eligible for the employer's health plan. In many cases in our industries, employees may choose to leave before completing one year of service. In addition, under the individual mandate in 2014, these employees may be receiving coverage through other sources (e.g., Exchange, Medicaid, dependent or parent coverage). Because these employees may be in the middle of a plan year for other coverage and do not want to lose their

annual benefits (i.e., restart their annual deductible or out of pocket maximum), they may choose to retain that coverage rather than enroll in the employer plan in the first year of service.

In situations where an employee is hired for or promoted to a position that the employer classifies as or “reasonably expects” to be full-time, the employee will be eligible for the employer’s health plan after the applicable wait period. Because the statute does not impose tax penalties on employers who do not offer coverage to part-time employees, it is a reasonable interpretation of the statute to permit employers to select a look-back period (or probationary period) to determine if new employees of unknown or part-time status become eligible for the employer’s health plan. Employers should have the flexibility to choose the length of the look-back period ranging from 3 to 12 months depending on the nature of their business and their workforce. Employers should also have the flexibility to determine how the look-back period will be measured. For example, employers should have the option of measuring the look-back period from hire date (or start date) to end of look-back period, or hire date to end of plan year. Many employers want the flexibility to enroll newly eligible employees in conjunction with a company’s annual open enrollment process. If an employer elects the look-back method for determining full-time status (and therefore eligibility for coverage), the measuring period should be consistently applied across an employer’s part-time, temporary, or seasonal workforce. For employers offering health plans, the 90-day wait period would begin once an employee’s eligibility for the employer plan is established.

Utilizing this form of a look-back not only allows for a longer measuring period, but also a longer stability period to reduce churn between employer and Exchange coverage. Not applying the look-back period to new part-time, temporary and seasonal employees would be a strong deterrent to employers’ giving employees the opportunity to work more than 30 hours per week on average and employing seasonal workers beyond 90 days. Moreover, employers who now voluntarily offer coverage to those employees would be less likely to offer coverage beginning in 2014 without being able to utilize a sufficient look-back period to establish eligibility for the employer’s plan. Failure to allow a full look-back to employers who currently offer coverage to their new part time, temporary, and seasonal employees may lead to employers dropping the coverage because these employees will be eligible for subsidized coverage through the Exchanges. The ultimate result would be increased costs for the federal government.

2. *Calculation of hours should not include unpaid hours or hours paid by a third party.* Notice 2011-36 proposes a monthly equivalent standard of 130 hours of service in a calendar month that for hourly employees would take into account each hour for which an employee is paid or entitled to payment from the employer for duties performed or on account of vacation, holiday, illness, incapacity, layoff, jury duty, military duty or leave of absence (capped at 160 hours for periods where no service is performed). The Coalition supports a standard based on hours paid but encourages the Department to clarify that unpaid leave or leave paid by a third-party other than the employer (e.g., state disability payments) is not included in the calculation.
3. *Calculation of hours should provide flexibility to allow an employer to measure hours based on calendar or pay period basis.* Employers will also need flexibility in administering the proposed look-back and stability period safe harbor provisions. For example, as noted above, the Notice indicates that these measurements would be made on a “monthly basis.” Because employer payroll systems do not use a single or uniform method of counting employees’ hours, the guidance should provide employers with the flexibility to use a pay period or calendar-based measuring period.

4. *Employers should be granted flexibility to utilize look-back periods within their workforce.* The Notice asks whether an employer should be permitted to adopt distinct measuring periods within their workforce. Because the Notice utilizes a broad control group definition to determine who is an applicable “employer,” it would be practical to give employers flexibility to utilize distinct measuring periods for particular businesses, locations, or reasonable classes of employees within the control group. For example, an employer’s particular control group may contain unrelated and diverse businesses that merit distinct treatment (e.g., a three-month measuring period might be appropriate for a seasonal resort, whereas an annual measuring period would be more appropriate for a sit-down restaurant in the same control group). It is important that employers have flexibility to pick the most reasonable options for their own workforces.

#### **B. Interaction With the Wait Period**

Notice 2011-36 requests comments on the interaction of the wait period described in Public Health Services Act §2708 (as created by PPACA §1201) and the employer responsibility provisions in IRC §4980H. The Coalition recommends that:

1. The 90-day wait period be applied on a continuous basis and that employees be required to maintain their plan eligibility throughout the 90 days; and
2. The wait-period be followed by a reasonable administrative period to permit employers time to enroll employees into coverage.

Employers will need time at the end of any wait period to enroll eligible participants into coverage. Plan enrollment and employee communication is more time consuming and difficult for employers with fluctuating work forces. Consequently, employers will need sufficient time to complete the communication with the employee and the insurer or plan administrator in order to complete the enrollment process after a wait period.

#### **C. Maintaining the Employment Connection During the Stability Period**

The Notice states that if an employee is determined to be full time during the look-back period, then the employee would be treated as a full-time employee during a subsequent stability period, regardless of the number of the employee’s hours of service during the stability period, so long as he or she “remained an employee.”

The Coalition recommends that employees maintain a connection with an employer and meet a minimum work threshold during the stability period. This is particularly important for employers with large numbers of part-time, temporary, or seasonal workers whose hours and patterns of work fluctuate considerably.

For such employees to maintain their minimum connection to the employer for purposes of the stability period and to maintain eligibility for coverage, employees should demonstrate their continued connection to the employer by maintaining a reasonable minimum threshold of work and by receiving a paycheck.

#### **D. Penalties**

Coalition members want to offer affordable, quality coverage to their employees despite the particular difficulties that come with offering coverage to a fluctuating workforce. Under IRC §4980H(a) employers who do not offer coverage to all full-time employees will pay a tax penalty on all full-time employees if one employee subsequently receives a premium assistance tax credit or cost-sharing reduction for coverage on the Exchanges. Under IRC §4980H(b) employers who offer coverage to all full-time employees will pay a penalty only with respect to full-time employees who are offered

unaffordable coverage or coverage that does not provide minimum value and who subsequently receive a premium assistance tax credit or cost-sharing subsidy for coverage on the Exchanges. Notice 2011-36 requests comment on how the proposed look-back/stability period would coordinate with the penalty provisions in §4980H. The Coalition's recommendations are provided below.

- 1) *Penalties should not apply during any look-back or wait periods.* We encourage the Department to clarify that penalties under 4980H(a) and (b) will not apply during any allowable look-back or wait period. The purpose of the look-back and wait period is to determine whether an employee of part-time or unknown status will meet the definition of a full-time employee and to assure that there is a sufficient employment connection between the employer and employee. Without this clarification, the look-back and wait-period provisions would be meaningless.
- 2) *Seasonal employees should not be included in the total number of full-time employee for purposes of calculating employer tax liability.* Most employers do not consider seasonal employees to be full-time employees. PPACA excludes certain seasonal employees in the head count for determining whether employers meet the 50-employee threshold for being subject to the law's employer shared responsibility provisions, but PPACA is silent as to seasonal workers' treatment for the purpose of calculating tax penalties under IRC §4980H(a)-(b). Consequently, we encourage the Department to clarify that seasonal employees as defined by current Department of Labor regulations should not be treated as full-time employees for purposes of calculating tax penalties under §4980H. If the Department rules otherwise and includes seasonal employees in the head count, economics will compel employers to reduce seasonal workers' hours and restrict their employment to 90 days (the maximum length of the wait period) in order to avoid penalties with certainty. This arbitrary cut-off harms both workers who lose pay and employers who lose trained workers before the season ends.
- 3) *A "substantially all" safe harbor should be provided to employers.* The Coalition appreciates the Department's interest in clarifying that an employer may avoid penalties if an employer provides coverage to all or "substantially all" of its full-time employees. It is important for employers who provide benefits for hundreds of thousands of employees at dozens of worksites to have a de minimis rule to protect against penalties being assessed for full-time employees who inadvertently may not have been offered coverage.

Notice 2011-36 notes the Department's intention to utilize the same definition for determining employer size for determining penalties under PPACA. This is problematic for employers who may be part of a large control group. For example, what happens when one franchise among hundreds fails to fully comply with PPACA? The Department should disaggregate the control group for the purpose of calculating penalties or devise the "substantially all" test in such a way to account for inadvertent missteps by control group members.

- 4) *A clear standard for offer of coverage should be developed.* IRC §4980H raises additional interpretive questions including, what does it mean for an employer to "offer its full-time employees (and their dependents) the opportunity to enroll in minimum essential coverage?" As the voice for employers with complex and variable workforces, we recommend providing a clear and flexible standard that employers can follow. For example, an employer that provides enrollment and eligibility materials to employees in a manner that meets current Department of Labor regulations should be considered to have met the "offer" requirement.
- 5) *Appropriate categories of exceptions should be granted.* The Notice requests comment on whether there are certain categories of exceptions that should be provided under the employer responsibility provisions of IRC §4980H(a) and how any proposed exceptions would be consistent with the structure and purpose of the §4980H(a) tax penalties provision. We generally recommend excluding employees who are not subject to the individual responsibility

provisions of PPACA (i.e., nonresident aliens, members of an exempt religious sect or division), as well as employees to whom the employer responsibility provisions do not and/or should not apply (i.e., expatriate, seasonal, and temporary employees). It would also be appropriate to apply a safe harbor where employers offer coverage to certain categories of their full-time employee population. It seems inconsistent with PPACA's goal of lowering costs and increasing coverage to require an employer to pay a penalty on an employee to whom the employer offers coverage because the employer is unable to provide coverage to a separate category of employees (e.g., temporary employees) within the workforce. Clarifying that these individuals should be exempted from §4980H(a) improves the administration of the penalties by aligning the mechanics with the Congressional intent to encourage employers to cover their full-time workforce. In addition, we believe that these categories of employees should not be included in the calculation of penalties for §4980H(b).

**II. ADDITIONAL COMMENTS AND QUESTIONS WITH RESPECT TO EMPLOYERS' INTERACTION WITH EXCHANGES AND IMPOSITION OF PENALTIES UNDER 4980H**

Notice 2011-36 provides us with an opportunity to raise some additional comments and questions that we respectfully ask the Administration to consider as you draft upcoming guidance and regulations regarding state health insurance Exchanges, the determination of whether employer benefits are affordable, and the imposition of tax penalties under the employer shared responsibility provision (IRC §4980H, as created by PPACA §1513). These provisions are inextricably linked to the questions raised in the Notice.

Many of the Coalition's member companies and trade associations believe that employers' interaction with the Exchanges and aspects of the shared responsibility provisions are fundamentally unworkable. We urge you to use your regulatory authority under IRC §4980H and the Internal Revenue Code (IRC) generally to interpret the statute in ways that allow for practical and workable administration of employer benefits, uniform and consistent reporting requirements, and predictability of penalties for employers.<sup>1</sup>

It is the view of the Coalition that the recommendations that we pose below are well within the purview of the Administration's regulatory authority and that they are a reasonable interpretation of PPACA. To the extent the Administration reaches a different conclusion, we encourage the Department to include our recommendations in the report due to Congress no later than January 1, 2013, (as required by PPACA §1411) recommending legislative changes related to "the rights of employers to adequate due process and access to information necessary to accurately determine any payment assessed on employers."

**A. Employer Communication With Exchanges and Federal Agencies**

A number of provisions of PPACA (e.g., §§1311, 1401, 1411, 1412, 1414, 1502, 1512, 1513, 1514) rely upon the transfer of information among individuals, employers, Exchanges, the Department of Health and Human Services, and the Department of Treasury to determine which employees are eligible for premium assistance tax credits or cost-sharing subsidies because an employer did not offer minimum essential coverage or because the coverage offered is deemed to be unaffordable or not of minimum value.

Below are the types of questions on which our member companies are seeking federal guidance.

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<sup>1</sup> See IRC §§4980H(d), 6671, 6201, 6202 providing express authority for Treasury to determine both the mode and time for the assessment of any internal revenue tax.

## *Employers for Flexibility in Health Care*

- How does the information reporting structure work among employers, individuals, Exchanges, Treasury, Internal Revenue Service (IRS) and HHS?
- What is the timing and process for Exchanges to report to Treasury the name and taxpayer identification number of each employee who was determined to be eligible for the premium tax credit or cost-sharing subsidies because the employer did not provide minimum essential coverage or the employer provided such minimum essential coverage but it was determined to be unaffordable to the employee or did not provide minimum value?
- How do the Exchanges determine if employees are eligible for a premium assistance tax credit or cost-sharing subsidy, and when will Treasury, HHS and the employer each receive notification?
- Will Treasury or another federal agency be primarily responsible for communication with employers, or will employers be responsible for following the communication and reporting protocols of 50+ state and regional Exchanges?
- How and when will an employer be notified of its total liability for federal tax penalties for a given year?
- What is the appeal process for an employer to challenge assessment of tax penalties?

We believe that the law does not provide:

- 1) A clear and streamlined process for communication among employers, state Exchanges, and the federal agencies with respect to information reporting, calculation and prediction of an employer's liability for penalties;
- 2) An adequate and timely appeals process for employers; or
- 3) A definitive answer as to who is the final arbiter with respect to the imposition of federal tax penalties upon an employer, a role generally reserved for the Department of Treasury and the Internal Revenue Service.

We are very concerned that the current development of guidance for establishment and operation of the state insurance Exchanges or CMS' proposed development of a federal data services hub<sup>2</sup> is not adequately taking into account a number of issues that employers will face under PPACA.

The administrative burden of providing information to 50+ state Exchanges and multiple federal agencies opens the door to inconsistent and duplicative reporting processes and requirements and a significant increase in our regulatory burden and costs, particularly for employers who operate in multiple states. As we consider the myriad new reporting requirements included in PPACA, we are exploring existing federal reporting processes to build upon the established reporting mechanisms for employers and to avoid unnecessary redundancies and duplications among the states and federal agencies.

Given the existing relationship between employers and Treasury/IRS with respect to the imposition of federal taxes on employers, we urge consideration of concentrating employers' reporting requirements, determination of penalties, and the appeals processes within these federal agencies rather than requiring employers to interact with each state Exchange and multiple federal agencies. We urge you to consider a more uniform, consistent, and predictable process for employers to allow them a more practical and workable administration of benefits for their employees and to avoid the disruption and unpredictability of costly tax penalties and appeals processes.

We are requesting that the agencies consolidate the information reporting, assessment of penalties, and the appeals processes for employers within a single federal entity, preferably the Department of Treasury.

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<sup>2</sup> Department of Health and Human Services, Centers for Medicare and Medicaid Services, "Guidance for Exchange and Medicaid Information Technology (IT) Systems, Version 2.0," May 2011.

**B. Minimum Essential Coverage: the “Affordability” Test and “Minimum Value” Standard**

IRC §36B (as created by PPACA §1401) states that in order for an employer-sponsored plan to be considered minimum essential coverage for purposes of an employee’s eligibility for a premium assistance tax credit or a cost-sharing subsidy (and therefore an employer’s liability for tax penalties), two tests must be met:

1. “Affordability” test: An employee’s required contribution with respect to the plan cannot exceed 9.5% of the applicable taxpayer’s household income; and
2. “Minimum value” standard: An employer-sponsored plan’s share of the total allowed cost of benefits provided under the plan is not less than 60% of such costs.

The use and determination of employee household income is of significant concern to the employer community. We view the use of household income for purposes of determining whether coverage is affordable for employees as not only an unworkable approach, but also an inaccurate assessment of whether the employer plan is affordable or whether an employee should be eligible for a credit or subsidy. Our member companies have raised key questions such as:

- How does an employer determine whether the cost of employer coverage exceeds 9.5% of an employee’s household income so that an employer can offer affordable coverage to their employees with some certainty?
- If household income is reported by the employee to Exchanges to determine whether employer coverage is affordable for a given year, how is that reported income substantiated and/or verified?
- If household income information for as much as two years prior is used as the basis of the affordability test outlined above, how does that prior income level correlate with the cost of current year employer-based coverage? Is the calculation based on single or family coverage?

While employers do not want access to confidential taxpayer information, linking the determination of affordability to household income makes it all but impossible for employers to adjust their coverage offerings accordingly and to assess accurately their tax liability under the law’s affordability provisions. This defeats the intention of the law of helping employers maintain affordable coverage options for their employees rather than pay penalties on the back end. Furthermore, the law creates an affordability test and holds an employer liable for tax penalties based upon information that the employer cannot know and cannot verify, so it renders any appeal process or due process futile.

For purposes of determining eligibility for a premium subsidy under PPACA §1411, an employee must provide household income data from the tax year two years prior to the enrollment period or coverage determination. In essence, determinations regarding whether an employer’s plan is affordable may be based on situations where the employee was not even employed by the current employer and in which the employee may have had a drastically different income level and/or been unemployed.

For example, an employer may hire a new employee with a competitive salary and provide employer-sponsored health coverage, but may still face a penalty based on that employee’s household income from one to two years prior. We think this creates an unintended consequence under the law to impose a penalty on an employer who is seeking to hire new and perhaps previously unemployed individuals, as is often the case in our industries. We are also concerned that it puts employees at risk for receiving subsidies that are subsequently disallowed based on their current income level and that would have to be repaid or reconciled on their tax returns.

There should be a correlation between an employee's current wages and the current coverage offered by the employer to determine affordability. Furthermore, we strongly urge the Administration to use its regulatory authority to create a "safe harbor" for employers that provides for a predictable mechanism to calculate their liability under the law and to determine in advance - before credits or subsidies are granted and before a tax penalty is imposed - that their coverage for a full-time employee is affordable based on the current wages paid by the employer and that the plan meets the minimum value required. Such information is available to employers and facilitates a more straightforward approach for employers to make business decisions related to the affordability of coverage options offered to employees, to communicate this to their employees and to maintain coverage for them.

We also seek guidance on the second prong of the test for determining whether an employer's plan provides minimum essential coverage for the purpose of an employee's eligibility for a credit or subsidy, i.e., whether the employer-sponsored plan's share of the total allowed cost of benefits provided under the plan is not less than 60% of such costs (the "minimum value" test). This provision of the law is unclear. Many have interpreted this 60% test to be an actuarial value. If this is the case, it raises the question for employer-sponsored health plans as to what benefits package is the basis of the actuarial calculation as the law was not intended to prescribe a mandated benefit package on employer-sponsored plans.

## **Conclusion**

In closing, we would like to thank you again for the opportunity to comment on the proposed look-back/stability period safe harbor method and to address specific questions that have been raised in discussions with our member companies regarding state health insurance Exchanges, the determination of whether employer benefits are affordable and provide minimum value, and the imposition of tax penalties.

We also would like to underscore the following points that we believe are well within your regulatory authority to address:

1. Employees should become eligible for employer coverage only after meeting a plan's eligibility requirements after a look-back period (or probationary period) and consistent with a subsequent 90-day wait period;
2. The Administration should consolidate the information reporting, assessment of penalties, and the appeals processes for employers within the Department of Treasury using established information reporting mechanisms between employers and Treasury to streamline communication and reduce costs and confusion; and
3. The Administration should create a "safe harbor" to provide employers certainty under the law and to determine in advance that their coverage for a full-time employee is affordable and that the plan meets the minimum value requirement.

Promulgating regulations that reflect these policy recommendations is critical to coalition members' ability to continue to provide affordable health insurance options and maintain stable coverage to employees.

*Employers for Flexibility in Health Care*

For questions related to this letter, please contact Anne Phelps, Principal, Washington Council Ernst & Young, Ernst & Young LLP, at 202 293-7474, on behalf of the Employers for Flexibility in Health Care Coalition.

Respectfully submitted,

Adecco  
Aetna  
Allegis Group  
American Hotel and Lodging Association  
American Staffing Association  
Associated Builders and Contractors  
College and University Professional Association for Human Resources  
CVS Caremark  
Express Services  
Food Marketing Institute  
Gap, Inc.  
Hilton Worldwide  
HR Policy Association  
International Association of Amusement Parks & Attractions  
International Franchise Association  
International Public Management Association for Human Resources  
Kelly Services  
Kentucky Retail Federation  
ManpowerGroup  
Missouri Retailers Association  
National Association of Convenience Stores  
National Association of Health Underwriters  
National Club Association  
National Council of Chain Restaurants  
National Grocers Association  
National Public Employer Labor Relations Association  
National Restaurant Association  
National Retail Federation  
PETCO Animal Supplies, Inc.  
Regis Corporation  
Retail Industry Leaders Association  
Robert Half International Inc.  
Ruby Tuesday, Inc.  
Texas Roadhouse, Inc.  
TrueBlue  
UPS  
Utah Food Industry Association  
Utah Retail Merchants Association  
Volt Workforce Solutions  
Walmart  
Washington Retail Association  
W.S. Badcock Corporation  
Yum! Brands, Inc.

# Employers for Flexibility in Health Care

October 31, 2011

Submitted electronically via <http://www.regulations.gov>.

Attn: CC:PA:LPD:PR (REG -131491-10)  
Room 5203  
Internal Revenue Service  
P.O. Box 7604  
Ben Franklin Station  
Washington, DC 20044

Centers for Medicare & Medicaid Services  
Department of Health and Human Services  
Attn: CMS-9974-P  
P.O. Box 8010  
Baltimore, MD 21244-8010

Request for Comments re:

- I) Health Insurance Premium Tax Credit, Internal Revenue Service, Department of the Treasury (REG -131491-10)
- II) Eligibility Determinations and Exchange Standards for Employers, Department of Health and Human Services (CMS-9974-P)
- III) Request for Comments on Health Coverage Affordability Safe Harbor for Employers, Internal Revenue Service, Department of the Treasury (Notice 2011-73)

We are writing in response to the above proposed rules and requests for comments on behalf of the Employers for Flexibility in Health Care ("EFHC"), a coalition 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.

The Coalition represents employers who create millions of jobs each year, employ a significant workforce in the US, offer flexible working environments for employees, and are a leading contributor to the nation's economic job recovery. Some examples include:

- The retail industry employs one of every five workers today, representing one of the largest industry sectors in the United States and a vital mainstay of our economy;
- The restaurant industry is the second-largest private-sector employer in the nation with about 12.8 million employees;
- Temporary staffing firms provide a wide range of temporary and contract staffing services in virtually every job category and employ approximately 2.6 million temporary and contract workers every day and almost 10 million workers annually;
- There are more than 36,000 supermarkets in the United States employing 3.4 million people;
- There are nearly 825,000 franchised businesses across 300 different business lines creating 18 million jobs;
- The construction industry's employment exceeds 5.5 million jobs;
- The lodging industry accounts for over 1.7 million jobs and represents over 51,000 properties across the United States;
- The convenience and fuel retailing industry employs more than 1.6 million people in more than 146,000 stores nationwide; and
- The floriculture industry (growers, suppliers, retail florists) has nearly 750,000 employees.

The employer requirements under PPACA are of particular importance to us, not only because many in our industries are struggling to remain in business and provide affordable health coverage for our employees, but also 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. Maintaining the ability to offer affordable coverage options to our unique workforce under the new requirements of the law is of special concern to us.

The EFHC Coalition welcomes the opportunity to share our comments with the Administration on provisions of PPACA that affect employers, and we appreciate that the Administration has been receptive to the comments from the employer community in developing regulatory guidance. Many in our coalition and the employer community in general remain concerned that the employer requirements under the law are fundamentally unworkable and ultimately will require re-examination through the legislative process, especially the 30 hours per week definition of full-time employee status, the affordability and minimum value standards for employer coverage, the imposition of tax penalties based on a household income test, the complex administrative reporting requirements, and authority given to state insurance Exchanges over employer-sponsored plans.

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. It is imperative that the Administration examine these provisions as a whole when developing regulatory guidance because the employer requirements under the law are inextricably linked. In particular, it is necessary to examine together the calculation of full-time employee at 30 hours average per week, the affordability and the minimum value tests, and the additional benefit requirements under the law (e.g., coverage of preventive care at no cost-sharing and the lifting of annual and lifetime coverage limits) in order for us to begin to estimate whether we will be able to maintain affordable coverage options within the confines of the law in 2014.<sup>1</sup>

In addition, providing a clear and administratively workable reporting process to determine individual eligibility for premium tax credits and ultimately to assess employer tax penalties is critical for our members. How the reporting process is structured between employers, state insurance Exchanges, and the federal agencies -- and the timing and frequency of these interactions -- will have a major impact on our administrative processes and costs.

On behalf of the Coalition, we will use this letter to provide a comprehensive set of comments to the Departments of Treasury ("Treasury") and Health and Human Services ("HHS") on the following issues:

- I) The affordability safe harbor for employers and minimum value standard;
- II) Employer reporting, interaction with Exchanges and federal agencies, and Exchange eligibility determinations and the Internal Revenue Service ("IRS") verification process; and
- III) The affordability safe harbor for employers and coordination with the definition of full-time employee under the "look-back" methodology.

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<sup>1</sup> It also will be critical to employers' ability to maintain affordable coverage that the nondiscrimination rules issued under §2716 of the Public Health Service Act afford flexibility to design health insurance plans that meet the needs of different segments of their workforces.

**I. Affordability Safe Harbor for Employers and Minimum Value Standard**

Internal Revenue Code (“IRC”) §36B (as created by PPACA §1401) states that in order for an employer-sponsored plan to be considered minimum essential coverage for purposes of an employee’s eligibility for a premium assistance tax credit or a cost-sharing subsidy (and therefore potentially an employer’s liability for tax penalties), two tests must be met:

1. “Affordability” test: An employee’s required contribution with respect to the plan cannot exceed 9.5% of the applicable taxpayer’s household income; and
2. “Minimum value” standard: An employer-sponsored plan’s share of the total allowed cost of benefits provided under the plan is not less than 60% of such costs.

In the Coalition’s June 17 comment letter responding to Treasury Notice 2011-36, we advocated for the consideration of a safe harbor for employers that provides a predictable mechanism to calculate their liability under the law and to determine in advance - before individual tax credits or subsidies are granted and before a tax penalty is imposed on an employer - that their coverage for a full-time employee is affordable and of minimum value. We proposed this safe harbor to be based on the current wages paid by the employer to avoid a myriad of problems in predicting and verifying employee household income. We appreciate Treasury’s consideration of our recommendation and believe that the affordability safe harbor for employers outlined in the Treasury notice of proposed rulemaking represents a potential path forward within the constraints of IRC §36B.

***Affordability Safe Harbor for Employers***

Treasury’s August 17 notice of proposed rulemaking (REG -131491-10) anticipates an affordability safe harbor that states *“an employer that meets certain requirements, including offering its full-time employees (and their dependents) the opportunity to enroll in eligible employer-sponsored coverage, will not be subject to an assessable payment under section 4980H(b) with respect to an employee who receives a premium tax credit or cost-sharing reduction for a taxable year if the employee portion of the self-only premium for the employer’s lowest-cost plan that provides minimum value does not exceed 9.5 percent of the employee’s current W-2 wages from the employer.”* The notice states that giving employers the ability to base their affordability calculations on their employees’ wages (information employers know) instead of employees’ household income (which employers generally do not know and do not want access to) is intended to provide a more workable and predictable method of facilitating affordable employer-sponsored coverage for the benefit of both employers and employees. The Treasury notice clarifies that notwithstanding the affordability safe harbor, employees’ eligibility for a premium tax credit would continue to be based on affordability of the employer coverage relative to employees’ household income as the general rule under the law.

The Coalition’s June 17 letter provided a number of recommendations for an affordability safe harbor, and as such, we strongly endorse the following aspects of Treasury’s August 17 notice:

- Clarifying that the statutory language specifies that the affordability of employer coverage is based on the employee premium paid for “self-only” coverage;
- Basing the calculation of the safe harbor on an employee’s current wages and thus allowing for the comparison of current premiums to current wages, rather than comparing current premiums to employee household income from prior years;
- Permitting employers to apply the affordability safe harbor prospectively; and
- Retaining the general affordability rule that individual eligibility for premium tax credits and employer liability for penalty assessments will be based on household income, which in most circumstances will likely be a more generous standard, for those employers who cannot meet the affordability safe harbor due to the cost of their plans.

Finally, we recognize that the safe harbor would be based prospectively on estimated or expected employee wages. Consequently, special consideration will be needed for employees with variable pay, such as tipped and commission-based employees.

**Estimates for the Affordability Safe Harbor**

The members of our Coalition have been undertaking analyses of the practical implications of the affordability safe harbor proposal to estimate whether they can meet the test based on employees' current wages. Employers' ability to meet the affordability test and continue to offer affordable coverage will depend heavily on the standard used to determine minimum value under PPACA, as well as the effect on plan costs of the additional benefit requirements under the law, including the coverage of preventive care at no cost sharing and the lifting of annual and lifetime coverage limits. Employers already are feeling the effects of rising reinsurance costs stemming from the lifting of annual and lifetime limits.

As a starting point, the Coalition estimates that in order to qualify for the proposed affordability test safe harbor based on 9.5% of the current wages of full-time employees, employers would have to offer a plan (of a minimum value) with a monthly employee premium share for self-only coverage of no more than \$119 for full-time employees whose incomes are at 138% of the federal poverty level (the effective Medicaid eligibility threshold) and of no more than \$345 for full-time employees whose incomes are at 400% of the federal poverty level (the upper-limit for eligibility for premium tax credits). It is important to emphasize that these estimates are based on:

1. The 2011 HHS Federal Poverty Guidelines for one person; and
2. An average 30-hour work week, which is the threshold for classification as a full-time employee under PPACA.

The table below summarizes the Coalition's basic estimates, including the corresponding hourly wages of employees eligible for Medicaid and premium tax credits under PPACA. In addition, the table illustrates that employers could face potential tax penalties for full-time employees who work an average of 30 hours per week with hourly wages between \$9.63 and \$27.92 and who receive premium tax credits.

<b>Estimates for Individual Eligibility for Medicaid or Tax Credits and Affordability Safe Harbor<sup>1</sup></b>					
Scenario	Percent of federal poverty level	Annual income	Hourly wage <sup>4</sup>	Affordability test safe harbor (9.5% of current wages)	Estimated employee premium share for self-only coverage for affordability test safe harbor <sup>5</sup>
Minimum wage worker <sup>2</sup> eligible for Medicaid	~104%	\$11,310	\$7.25	Medicaid eligible	n/a
Statutory upper limit for Medicaid eligibility	133%	\$14,484	\$9.28	\$1,376 per year	\$115 per month
Effective upper limit for Medicaid eligibility <sup>3</sup>	138%	\$15,028	\$9.63	\$1,428 per year	\$119 per month
Upper limit for eligibility for tax credits	400%	\$43,560	\$27.92	\$4,138 per year	\$345 per month

<sup>1</sup> Based on 2011 HHS Federal Poverty Guidelines for one person (\$10,890).  
<sup>2</sup> Federal minimum wage (\$7.25 per hour)  
<sup>3</sup> PPACA §2002 (as added by HCERA §1004(e)(2)) requires states to apply an "income disregard" of five percent of the federal poverty level in meeting the income test, resulting in an effective income threshold of 138% of FPL for Medicaid eligibility.  
<sup>4</sup> Based on the PPACA threshold for classification as a full-time employee (average 30 hours per week) multiplied by 52 weeks.  
<sup>5</sup> 9.5% of current wages divided by 12 months

It is important to note that employers' estimates are based on 2011 wages currently being paid, current employer contributions, estimates of what will be considered minimum value plans under the law, and the impact of the new benefit mandates under PPACA. It is difficult to create an accurate assessment for 2014 regarding what constitutes an affordable benefit package; this analysis relies on the interplay of many of these factors for which we are awaiting regulatory guidance under the law, as well as analysis of overall health care costs and economic factors affecting wages.

It also remains unclear how Treasury ultimately will treat certain employer-provided benefits, including employee wellness programs and employer contributions to Health Reimbursement Arrangements ("HRAs") or Health Savings Accounts ("HSAs"). Coalition members strongly believe that employers' spending on employee wellness programs and employer contributions to HRAs and HSAs should be counted toward the premium contribution for the affordability test.

Many Coalition members are concerned based on their 2011 estimates that it will be challenging for them to offer coverage with a monthly premium share for employees that fits within the proposed affordability safe harbor based on current wages. In order to offer a plan of minimum value that meets the affordability test, employers' contribution to the plan also must be affordable for the employer. It is critical that the Administration recognize this uncertainty and the need to strike a balance as you issue regulatory guidance around the minimum value standard, which is inextricably linked to the affordability safe harbor.

Not all employers will be able to utilize the affordability safe harbor based on current wages due to the cost of their plans for employers and employees. These employers will fall under the general rule that requires that an employee's premium contribution to the plan cannot exceed 9.5% of the employee's household income. Tax credit eligibility for employees and penalty assessments for employers will also be based on the employee's household income. The Coalition remains concerned about the potential imposition of tax penalties based on a household income test and maintain that it is an unworkable approach for employers who do not have and do not want access to this confidential information. Nonetheless, we recognize that the application of the general rule may be necessary or even preferable for certain employers and we provide some recommendations in section III of our letter regarding the verification of individual eligibility for tax credits based on household income and subsequent imposition of employer penalty assessments.

### ***Minimum Value***

Under PPACA, employers are required to provide coverage to their full-time employees that is both "affordable" and meets "minimum value" or face penalties for full-time employees that qualify for tax credits through the Exchange. Code section 36(B)(c)(2)(C)(ii) provides that a plan shall not meet the minimum value if "*the plan's share of the total allowed costs of benefits provided under the plan is less than 60% of such costs.*" While neither Treasury nor HHS requested specific comment on the minimum value test, the EFHC is providing initial comment on the definition of "minimum value" in recognition of the tremendous impact that this provision will have on the affordability and administration of employee benefit plans and because this provision is interlocked with the other employer provisions in such a way that any analysis of the affordability provisions is incomplete without an understanding of minimum value.

The minimum value requirement is generally understood to be a 60% actuarial value test. An actuarial value is expressed as a percentage of medical expenses estimated to be paid by a plan for a standard population for a set of allowed charges (typically those services covered by the plan). Consequently, plans with different benefit designs and cost-sharing structures can be actuarially equivalent. See *Setting and Valuing Health Insurance Benefits*, Congressional Research Service (April 6, 2009). Actuarial value is a summary measure of the cost-sharing provisions of a plan for the services it covers, but it does not mean that identical benefits or cost-sharing structures apply

to all plans or all individuals. This distinction is important. Minimum value is a measuring tool; it is not intended to be a plan control.

The minimum value requirement included in PPACA is not a benefit mandate locking employers that provide voluntary coverage into a prescribed package of benefits or rigid cost-sharing structure. Any attempt to create a backdoor mandate through the minimum value standard is a misapplication of the law. In fact, Treasury emphasized in the NPRM that "*the regulations under section 1302(d)(2) are expected ... to reflect the fact that employer-sponsored group health plans and health insurance coverage in the large group market are not required to provide each of the essential health benefits or each of the 10 categories of coverage described in section 1302(b)(1) of the Affordable Care Act*" (emphasis added).

The majority of employers offer the most comprehensive coverage possible at a price that is affordable for and tailored to their specific workforce. A report from the Department of Labor surveying 3,200 employer plans found a median deductible of \$500 and an 80/20 coinsurance paired with a median out-of-pocket maximum of \$1,900 in 2009. The report further revealed extensive coverage of hospital, physician, and other medical services. See *Selected Medical Benefits: A Report from the Department of Labor to the Department of Health and Human Services* (April, 15, 2011). In addition, several new insurance reforms under PPACA apply to large employers and require coverage of preventive care with no cost-sharing and the lifting of most life-time and annual limits. As a result, many lower value plans will be discontinued in 2014.

Employers in the EFHC Coalition are concerned however that a narrow or inflexible definition of minimum value could hamper their ability to continue to offer affordable benefits to their employees. Employers need a minimum value definition that recognizes the need for flexible benefit design and cost-sharing structures and cannot be based on an overall dollar value of a plan. A workable definition must recognize the great diversity among employer plans. Employer plan costs can vary widely based on the health status of their workforce, size, sector, turn-over rate, local provider networks, and geographic cost factors. A minimum value calculation must allow for standardization that takes into account all of these factors and is administratively simple for all employers.

Regulations should expressly confirm that employer contributions or incentives regardless of how they are paid (including contributions to an HRA or an HSA) should be included in the actuarial value of the corresponding health plan.<sup>2</sup> Regulations should also take into account the value of other employer-provided coverage such as in-house clinics and services and benefits provided by wellness programs. The EFHC Coalition further requests reaffirmation in the minimum value regulations that not all plan options offered by an employer are required to meet the minimum value test. Under PPACA, employers are required to offer at least one plan that meets the affordability and minimum value tests to their full-time employees. Employees should have the option to enroll in a lower-cost plan offered by the employer as long as that plan meets the other requirements under the law, i.e. preventive care at no cost sharing and the lifting of annual and lifetime limits.

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<sup>2</sup> PPACA expressly includes the employer contributions to an HSA, however, many employers also utilize HRAs and wellness programs to supplement employee health plans. See PPACA §1302(d)(2)(B) including employer HSA contributions in the actuarial value.

### **Methodologies for Calculating Minimum Value**

The EFHC Coalition strongly urges the Administration to provide a variety of methods that employers may elect for measuring whether the plan's share meets *"60% of the total allowed cost of benefits that are provided by such plan or coverage."* We re-emphasize that minimum value is intended to operate as a general measurement of plan value, not a control on benefit design.

It was not the intent of PPACA to dictate a defined benefit package to large employers that offer coverage. However, we are aware that one methodology under consideration for the minimum value standard would be to place an actuarial valuation on the essential health benefits package as described in PPACA §1302(b)(1) without inclusion of the cost-sharing limitations in PPACA §1302(c). See 1302(d)(2)(A),(C). We want to emphasize that this type of valuation standard raises some significant concerns for employers, and we urge you to contemplate prior to issuing regulatory guidance on the minimum value standard.

Many employers view any attempt to tie voluntary employer benefits to the list of essential health benefits as effectively a mandate to cover the essential health benefits. Tying the minimum value test to the essential health benefits could force employers to change their cost-sharing structures and cover the essential health benefits in order to meet the test. This would cause an undesirable increase in premiums for employers and employees, which runs contrary to other provisions in PPACA, such as the tax on high-cost plans, that encourage employers to control health insurance costs. Furthermore, benefit mandates hit hardest those employers who struggle the most to maintain coverage with continued rising health costs. Some of the employers in our Coalition employ large numbers of low-income workers and will struggle to meet the 9.5% affordability test; subsequently, they will be faced with a difficult calculation of trying to meet both the affordability requirement and the minimum value test. If employers cannot meet both tests, they face tax penalties, and the benefits of offering coverage decrease significantly.

Comparing employer plans to the essential health benefits also raises some practical implications. Actuarial value requires a comparison against a standardized population. It is not clear that the Exchange population will be reflective of the national, large employer population with respect to age, health status or utilization. Further, not all of the benefits included in the essential health benefits are standard in employer plans. For example, it does not make sense to include pediatric dental in the actuarial value of employer coverage given that most employer plans provide dental coverage outside of the health plan. Benefits such as habilitative care and substance use disorder treatment make up a small percentage of the value of a plan, typically less than 5%, but requiring coverage at a 60% cost-sharing level could cause a significant premium increase for some plans.

Consequently, a more reasonable actuarial value calculation would permit plans to exclude benefits that are not currently covered under the plan from the calculation. Including only those benefits covered by the plan would comport with the language of PPACA which refers to minimum value as *"the percentage of the total allowed cost of benefits provided under a group health plan or health insurance coverage that are provided by such plan or coverage."* See PPACA §1302(d)(2)(C), *emphasis added*.

A hallmark of the EFHC Coalition is our consistent plea for flexibility and workable solutions to accommodate the diversity of employers and plans that must comply with these requirements. We appreciate that in its August 17 NPRM under minimum value Treasury notes *"that the regulations will seek to further the objective of preserving the existing system of employer-sponsored coverage, but without permitting the statutory employer responsibility standards to be avoided."*

We strongly recommend that the Administration consider providing multiple methodologies for employers seeking to comply with the minimum value test. Providing multiple methodologies,

especially methodologies that are administratively simple, will be particularly important for small and mid-size employers who will be required to complete the minimum value calculations. Under PPACA, employers with as few as 51 full-time equivalents are required to manage these complex evaluations. See IRC §4980H(c)(2)(A)-(B). Small and mid-size employers frequently do not have the resources within their companies to perform complex actuarial calculations.

PPACA contemplates the use of a variety of actuarial methods and expressly requires “*the Secretary to develop guidelines to provide for a de minimus variation in the actuarial valuations used in determining the level of coverage of a plan to account for differences in actuarial estimates.*” See PPACA §1302(d)(3). The EFHC Coalition encourages the Administration to focus on providing multiple methodologies that employers may elect to utilize to meet the standard such as but not limited to:

- Attestation that the employer plan’s predominant cost-sharing arrangement (e.g., co-payments or co-insurance) provides for the plan to pay approximately 60% of the total allowed benefit costs;
- Establishing safe harbor examples to which employers could compare their plans’ predominant cost-sharing features, such as deductibles, coinsurance and out-of-pocket maximums, to plan designs expected to satisfy the standard such as a High-Deductible Health Plan as defined by IRC §223 (which has a defined out-of pocket maximum)<sup>3</sup>;
- Providing an actuarial valuation from a qualified actuary; and
- Providing other methods that promote ease of administration and are based on a standard population that is reflective of the population covered by employer-sponsored plans in the large group market (i.e., non-elderly, privately insured, employed, etc.).

In addition, the Administration could also utilize its authority to designate specific types of coverage as minimum essential coverage to set certain safe harbor plan designs for employers. See IRC §5000a(f)(1)(E). One such option could be a high-deductible health plan as described in IRC §223.

### ***Transition Relief***

The EFHC Coalition also welcomes the recognition in the Treasury notice of proposed rulemaking that transition relief may be essential to preserving the existing system of employer-sponsored coverage as the new requirements under PPACA become effective in 2014. The minimum value standard is a new requirement for employers who may not know prior to 2014 how this provision will affect their plans or how it will work in connection with the other requirements under PPACA. A grace period will be critical as employers seek to understand and comply with PPACA. The EFHC Coalition strongly encourages the Administration to consider delaying the implementation of the penalties under IRC §4980H 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 dry run will help the Administration evaluate the impact of the standards and prevent employers from reactively dropping coverage if it is determined that revisions to the rules are necessary once all of the provisions are effective.

Because an employer-sponsored plan must meet the affordability and minimum value tests to be considered minimum essential coverage for purposes of an employee’s eligibility for a premium

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<sup>3</sup> The Congressional Research Service estimated a typical high deductible health plan at actuarial value of 76% excluding the employer’s HSA contributions and 93% including an employer HSA contribution of \$760. See *Setting and Valuing Health Insurance Benefits*, Congressional Research Service (April 6, 2009).

assistance tax credit or a cost-sharing subsidy (and therefore inextricably linked to an employer's potential liability for tax penalties), we strongly encourage the Administration to consider granting transition relief that includes sufficient time for reexamination of both the minimum value and affordability provisions. PPACA contemplates that these standards may require re-examination. The Treasury NPRM states that the law provides for the affordability test—set at 9.5%—to be adjusted after 2014. PPACA also provides for the Comptroller General, within 5 years of enactment, to conduct a study, including legislative recommendations, on the affordability of coverage, including whether the percentage of household income specified in IRC §36B(c)(2)(C) *"is the appropriate level for determining whether employer-provided coverage is affordable for an employee and whether such level may be lowered without significantly increasing the costs to the Federal Government and reducing employer-provided coverage."* See PPACA §1401(c)(1).

We also suggest that smaller or mid-sized employers, or certain low-margin industries such as those represented by the EFHC Coalition, may require a phased-in transition from a lower actuarial value in order to preserve coverage in those markets.

The EFHC Coalition continues to examine the interplay between the affordability test and the minimum value standard. We are working with our benefit managers and actuaries to perform the calculations necessary to estimate how we can provide affordable coverage of the highest value to our employees in 2014. We appreciate the Administration's receptivity to our comments. As you contemplate rulemaking on the affordability and minimum value tests, we urge the use of flexible methodologies that recognize diversity in employer-sponsored coverage and create a balanced approach to these provisions that will allow us to maintain the ability to provide affordable, quality coverage to our employees.

**II. Employer Reporting, Interaction with Exchanges and Federal Agencies, and Exchange Eligibility Determinations and IRS Verification Process**

***Employer Reporting Requirements***

The EFHC Coalition has been undertaking a comprehensive analysis of the major employer 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 substantive coverage requirements and imposition of penalties under the law. As you draft upcoming PPACA regulations affecting employers, we urge you to use the regulatory process to create rules that allow for practical and workable administration of employee benefits, predictability of penalties, and uniform and consistent annual reporting requirements. Failure to develop a workable reporting and verification system will increase the administrative burden and costs for employer-sponsored plans without creating any benefit for employees or the quality of their health care.

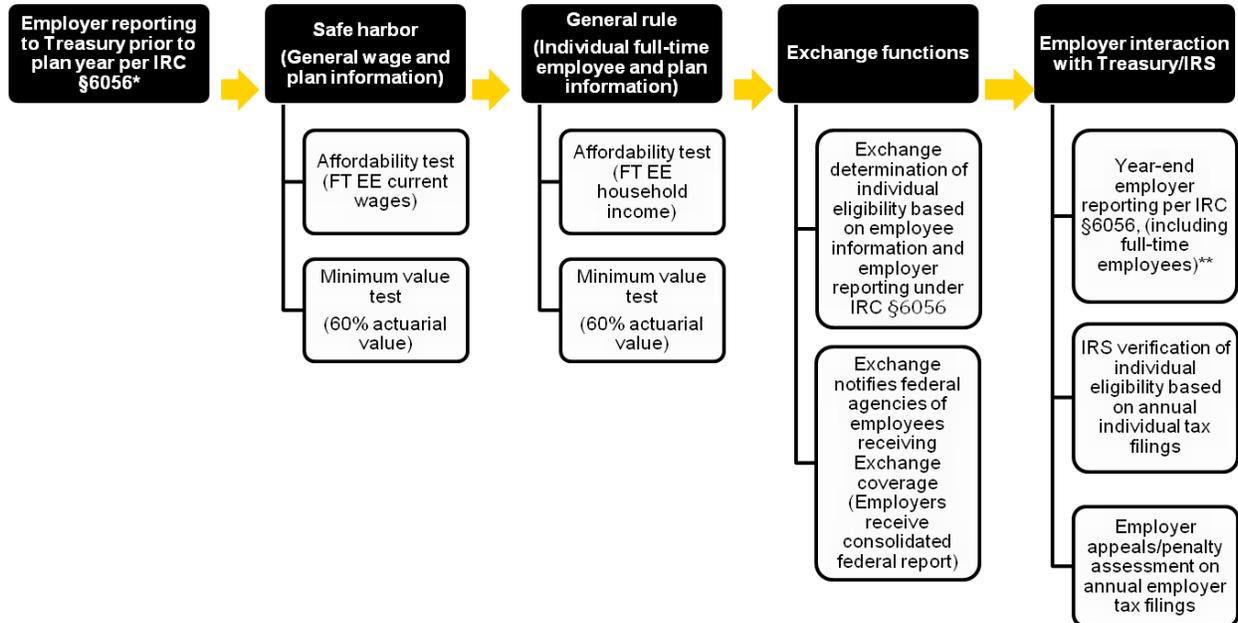
In its August 17 proposed rule (CMS-9974-P), HHS focuses on the information that state insurance Exchanges will need to determine individual eligibility for tax credits, including information about employer-sponsored health plans. As you continue to develop regulations in this area we strongly urge you to consider the following criteria:

- The reporting processes should be simple, minimize redundant reporting, and focus on reducing the administrative burden and associated costs for employers that offer health coverage;
- The reporting process should contemplate the numerous PPACA provisions that require new employer reporting and consolidate reporting obligations to the greatest extent possible on an annual basis, utilizing existing reporting mechanisms where possible;
- The reporting process for employers should be centralized within the Department of Treasury as the Department, along with the IRS, is ultimately responsible for administering the appeals process for employers and the imposition of penalty assessments; and
- The reporting process should recognize that the determination of individual eligibility for premium tax credits by state insurance Exchanges and the assessment of employer tax penalties by the IRS are two distinct and separate processes.

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. We believe that 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 diagram below represents a basic schema of the major employer requirements and depicts the EFHC Coalition's recommendations for the flow of information and timing of the process under PPACA's employer requirements.

**EFHC Proposed Diagram of Employer Requirements**



The coalition proposes that a single annual report under IRC §6056 could include both prospective and retrospective information. For example, the annual report employers will submit by January 31, 2015, could include prospective plan-level information (per statutory list below) to allow employers to utilize the safe harbor. The report also could include employee-specific information regarding the previous calendar year of 2014 (per statutory list below), particularly for employers reporting of their full-time employees to facilitate IRS' verification of individual eligibility for tax credits and assessment of employer tax penalties.

**\*Employer prospective reporting requirements per IRC §6056 prior to plan year**

- Name, date, and employer identification number of the employer
- Certification as to whether the employer offers full-time employees and their dependents the opportunity to enroll in minimum essential coverage under an eligible employer-sponsored plan. If so, the employer must also report:
  - Length of any wait period
  - Months during the calendar year during which coverage was available
  - Monthly premium for the lowest-cost option in each of the plan's enrollment categories
  - Applicable large employer's share of the total allowed cost of benefits under the plan

**\*\*Employer retrospective reporting requirements per IRC §6056 at end of year**

- The number of full-time employees for each month during the calendar year
- The name, address, and TIN of each full-time employee during the calendar year and the months (if any) during which such employee (and dependents) were covered under any such health benefits plans
- Such other information as the Secretary may require

A major challenge to the annual reporting process under IRC §6056 is the statutory deadline of January 31 for those employers who do not utilize a January plan year start date. Employers utilize a variety of enrollment periods and plan year start dates that work best for their workforce. For example, many retailers hold their open enrollment period in February or May with their plan year beginning in April or July in order to have all employees focused on retail sales during their busiest months of September through December. While a January reporting deadline may be workable for end-of-year reporting on full-time employee status and their coverage under the employer plan for the previous year, it poses challenges for prospective reporting on general plan information for the affordability safe harbor. Reporting processes may need to be set up that allow for rolling reporting deadlines for employer plan level information to utilize the affordability safe harbor, rather than one calendar year report in January for these employers.

### ***Exchange Eligibility Determinations***

In its August 17 proposed rule, HHS makes clear your view that the law creates “a central role for the Exchange in the process of determining an individual’s eligibility for enrollment in a qualified health plan as well as for insurance affordability programs” (e.g., Medicaid, CHIP, premium insurance tax credits, etc.). The proposed rule states that Exchanges will interact with employees and their employers in order to determine individual eligibility for premium tax credits or cost-sharing reductions because the employer-sponsored plan does not meet a minimum value standard or is not affordable under IRC §36B. The proposed rule also states that HHS considered whether the Secretary of HHS should determine eligibility for Exchange participation and for insurance affordability programs but chose not to take that approach to keep the eligibility and enrollment functions consolidated at the State level.

While we agree with this state-based approach in principle for providing coverage to the uninsured, we are concerned about the non-traditional roles of the states or HHS making determinations over the affordability and minimum value of employer-sponsored plans. Further, we are concerned that the administrative burden of providing information to 50+ state Exchanges and multiple federal agencies would open the door to inconsistent and duplicative reporting processes and requirements and a significant increase in our regulatory burden and costs, particularly for employers who operate in multiple states.

In the proposed rule, HHS contemplates new reporting requirements (templates or centralized databases) that would require employer reporting directly to HHS and/or the Exchanges. We appreciate the recognition by HHS that the overall goal is to make the process efficient and easy for employees to access and to minimize the burden on employers. However, it is the view of the Coalition that these proposed reporting requirements are unnecessary and would be overly burdensome given the reporting requirements to Treasury under IRC §6056.

As stated above, employers may be able to report the necessary information to Treasury under IRC §6056 on a prospective basis regarding minimum essential coverage under the employer plan that is needed by the Exchanges to assess the coverage being provided by the employer. In order to minimize redundant reporting and frequent and costly interactions between employers and 50+ state Exchanges, we strongly recommend that HHS and the Exchanges rely on the information that will be reported to Treasury regarding employer-sponsored coverage. The Exchange will then need to gather employee household income information (which employers do not have) to make their determination about employees’ eligibility for tax credits.

We are also examining the reporting requirements under §1512 of PPACA amending the Fair Labor Standards Act that require employers to inform their employees of their coverage options at the time of hiring through a written notice, including information on the existence of an Exchange and a statement that if the employer’s plan does not meet minimum value, an employee may be eligible for

a premium tax credit to purchase Exchange coverage. The employer must also notify the employee that, if the employee purchases Exchange coverage, the employee will lose their employer contribution to health benefits and the corresponding tax exclusion for those benefits. This notice may help provide employees with the necessary information needed regarding their employer plan if they choose to seek Exchange coverage. However, we would note that the effective date under the law for employers to provide this notification is March 1, 2013, and we strongly urge the Departments of Labor, HHS, and Treasury to re-examine this requirement date considering that state insurance Exchanges will not be fully operational until 2014.

***Exchange Notification to Employer***

According to the HHS proposed rule, the Exchange will notify the employer and identify the employee whom the Exchange has determined is eligible for a tax credit or cost-sharing reduction. HHS states that the content of this notice will be determined in future rulemaking. The EFHC Coalition is still discussing whether an approach can be developed that would provide a uniform standard for states to provide this notification to an employer at regular intervals. As one can imagine, a multi-state employer could receive countless notifications from numerous states in a variety of forms for employees seeking Exchange coverage. We encourage the Department to consolidate information from all 50+ state Exchanges using a centralized, federal process that will provide a single report to employers, preferably on a monthly or quarterly basis in order to help employers book their potential financial liability.

The Coalition also concurs with HHS's statement that the Exchange is required to verify information only for those applicants seeking eligibility determinations for insurance affordability programs, which we hope will minimize unnecessary employer interaction with Exchanges.

The EFHC Coalition is also considering other ideas for the interaction between Exchanges and employers upon notification of an employee seeking Exchange coverage, such as the option of allowing an employer to make an election on their form reporting information from IRC §6056 or notify the state that they wish to make a contribution adjustment on behalf of the employee to help them maintain employer coverage. This may be a particularly important option for small to mid-size employers.

***IRS Verification, Appeals, Penalty Assessment***

We are requesting that the agencies consolidate the information reporting, the appeals processes, and the assessment of employer tax penalties within a single federal entity, preferably the Department of Treasury and the IRS. We urge the Department of Treasury to utilize their regulatory authority under IRC §4980H and the Internal Revenue Code generally to interpret the statute in ways that allow for practical and workable administration of employer benefits and provide predictability of potential penalties for employers, including how and when an employer will be notified of its total liability for federal tax penalties for a given year.

We feel strongly that the determination of individual eligibility for premium insurance tax credits or cost-sharing subsidies by state insurance Exchanges should be a separate and distinct process from the subsequent verification of individual household income data and determination of employer penalty assessments by Treasury and the IRS. This is necessary because the Exchanges will make eligibility determinations in real-time based in part on employee self-reporting of their household income and employment status. Reporting of household income may often be incomplete. Even if an attempt is made to verify household income with the IRS during the coverage year, it likely will be based on prior year tax returns and might not accurately capture current household income. Treasury and IRS will not be able to verify accurately employees' household income until their annual individual taxes are filed, which may occur after the coverage year.

We believe it is critical that the IRS verify individual eligibility for a premium tax credit based on household income once the individual's tax return has been filed for the previous year. Verification by the IRS is necessary because this is the standard by which employers will be held liable for penalties under the law and is information that cannot be known to an employer and often may not be truly verifiable in real time by Exchanges.

Furthermore, due to the nature of our workforce, it is also imperative that we are able to utilize the look-back methodology to determine and report full-time employee status for employees receiving premium tax credits. End-of-year reporting by employers on their full-time employees combined with IRS verification of household income based on individual tax filings will allow for more accurate assessment of employer penalties.

Thus, we have outlined a potential reporting process under IRC §6056 for Treasury and the IRS that includes the information required to make an accurate assessment of employer penalties for those employees receiving tax credits for Exchange coverage including:

1. Prospective reporting on general plan information regarding minimum essential coverage provided by an employer;
2. Retrospective or end-of-year reporting on specific employee full-time status and coverage; and
3. IRS verification of household income based on individual annual tax filings.

Finally, given the need to have complete and accurate information to appropriately assess any employer penalty, we suggest that penalties be assessed once a year after all employer and employee verifications are complete. Additionally, we encourage Treasury to coordinate any penalty assessment that captures total liability for an employer on a given year with an employer's annual corporate tax filing and ask that it be made clear that IRS traditional appeals processes are available to employers to engage with the IRS to ensure the accuracy and appropriateness of any assessments.

The recommendations we pose are well within the purview of the Administration's regulatory authority and are a reasonable interpretation of PPACA. To the extent the Administration reaches a different conclusion, we encourage the Departments to include our recommendations in the report due to Congress no later than January 1, 2013, (as required by PPACA §1411) recommending legislative changes related to *"the rights of employers to adequate due process and access to information necessary to accurately determine any payment assessed on employers."*

**III. Affordability Safe Harbor for Employers and Coordination with the Definition of Full-time Employee Under the "Look-back" Methodology**

As stated in our June 17 letter responding to Treasury Notice 2011-36, 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. Treasury Notice 2011-73 requests additional comments on the proposed affordability safe harbor, including its interaction with the proposed "look-back/stability period safe harbor method" used for determining who is a full-time employee.

In general, and as described above, we believe the affordability and look-back safe harbors are compatible and can be coordinated. However, Treasury and the IRS would need to establish reporting structures under IRC §6056 that allow for prospective reporting based on general plan information for the affordability safe harbor and for retrospective reporting that includes employees determined by the employer to be full time based on the look-back safe harbor. The reporting of both prospective and retrospective information could potentially be harmonized by 2015 to be included in a single annual reporting process, thereby avoiding unnecessary administrative complications for employers (with potential modifications for employers with varying plan year start dates) and providing Treasury with necessary information regarding employer-sponsored coverage for their full-time employees. The EFHC believes that both of these safe harbors are critical to the preservation of the current system of employer-provided coverage.

The EFHC Coalition would like to reiterate our support for the proposed "look-back/stability period safe harbor method" for determining which employees would be considered full time for a particular coverage period. In situations where an employee is hired for or promoted to a position that the employer classifies as or reasonably expects to be full-time, the employee will be eligible for the employer's health plan after the applicable wait period. Because the statute does not impose tax penalties on employers who do not offer coverage to part-time employees, it is a reasonable interpretation of the statute to permit employers to select a look-back period to determine if new employees of unknown or part-time status become eligible for the employer's health plan. Employers should have the flexibility to choose the length of the look-back period ranging from 3 to 12 months depending on the nature of their business and their workforce. Employers should also have the flexibility to determine how the look-back period will be measured. For example, employers should have the option of measuring the look-back period from hire date (or start date) to end of look-back period, or hire date to end of plan year. Many employers want the flexibility to enroll newly eligible employees in conjunction with a company's annual open enrollment process.

We believe this methodology not only allows for a longer measuring period, but also for a longer stability period to reduce churn between employer and Exchange coverage, thereby minimizing disruption of employees' coverage, access to providers and annual benefits. Moreover, we strongly concur with the Administration that this approach is more workable than monthly determinations of employees' eligibility for coverage and employers' liability for tax penalties IRC §4980H. The look-back/stability period safe harbor also has the potential to provide the flexibility employers need to preserve flexible work arrangements. Because our coalition members have workforces with high turnover rates and fluctuating work schedules, it is imperative that employees not designated as full time become eligible for coverage only after meeting a plan's eligibility requirements, as established by the employer.

## **Conclusion**

In closing, we would like to thank you again for the opportunity to share our comments with the Administration on provisions of PPACA that affect employers, and we appreciate that the Administration has been receptive to the comments from the employer community in developing regulatory guidance. Because the industries represented in the EFHC Coalition employ large, fluctuating workforces and often sell low-margin consumer goods and services, even small increases in premium costs will place our businesses in the untenable position of being forced to stop offering coverage, forgo hiring of new employees, reduce employee hours to part-time status, raise consumer prices, or some combination of the above. The Coalition is working hard to propose regulatory solutions that make coverage affordable for both employers and employees. We want to be able to offer the most comprehensive coverage possible at a price that is affordable for and tailored to our specific workforces.

As demonstrated in these comments, the interplay of the employer requirements under the law have significant consequences for employers and their ability to maintain flexible work options and affordable health coverage for their employees. Because the employer requirements are inextricably linked, it is imperative that the Administration examine these provisions as a whole when developing regulatory guidance.

We also would like to underscore the following points that we believe are well within your regulatory authority to address:

1. As you contemplate rulemaking on the affordability and minimum value tests, we urge the use of flexible methodologies that recognize diversity in employer-sponsored coverage and create a balanced approach to these provisions that will allow us to maintain the ability to offer affordable coverage options to our employees, including the need for appropriate transition relief and a grace period from penalties in order for us to examine the impact of the law in 2014 and beyond.
2. The employer reporting requirements under the law and the interaction between employers, insurance Exchanges, and the federal agencies in conjunction with the substantive coverage requirements and imposition of penalties under the law are critical administrative and cost components that must be considered. We urge that the reporting processes minimize redundant reporting to multiple states and federal agencies, and that reporting processes be centralized within the Department of Treasury and the Internal Revenue Service, the agencies ultimately responsible for administering the appeals process for employers and imposition of penalty assessments.
3. The affordability safe harbor and the full-time employee look-back safe harbor can be coordinated and are compatible provided a reporting structure is established under IRC §6056 that allows for prospective reporting based on general plan information for the affordability safe harbor and for retrospective reporting that includes employees determined by the employer to be full time based on the look-back safe harbor. The EFHC believes that both of these safe harbors are critical to help us maintain coverage for our employees.

Promulgating regulations that reflect these policy recommendations is critical to coalition members' ability to continue to provide affordable health insurance options and maintain stable coverage to employees.

For questions related to this letter, please contact Anne Phelps, Principal, Washington Council Ernst & Young, Ernst & Young LLP, at 202-467-8416, on behalf of the Employers for Flexibility in Health Care Coalition.

Respectfully submitted,

7-Eleven  
Adecco  
Aetna  
Allegis Group, Inc.  
American Hotel and Lodging Association  
American Staffing Association  
Associated Builders and Contractors, Inc.  
Associated Food and Petroleum Dealers  
Brinker International, Inc.  
Carlson Restaurants, Inc.  
DineEquity, Inc.  
Express Services, Inc.  
Food Marketing Institute  
Hilton Worldwide  
HR Policy Association  
International Association of Amusement  
Parks & Attractions  
International Franchise Association  
Jack in the Box, Inc.  
Kelly Services  
Manpower Group  
National Association of Convenience Stores  
National Association of Health Underwriters  
National Club Association  
National Council of Chain Restaurants  
National Grocers Association  
National Restaurant Association  
National Retail Federation  
OSI Restaurant Partners, LLC  
Pep Boys  
Petco Animal Supplies, Inc.  
PPG Industries  
Regis Corporation  
Retail Industry Leaders Association  
Robert Half International Inc.  
Ruby Tuesday, Inc.  
Self-Insurance Institute of America  
Society of American Florists  
Texas Roadhouse, Inc.  
Tommy Bahama  
TrueBlue  
U.S. Chamber of Commerce  
Volt Workforce Solutions

Alabama Grocers Association  
Arkansas Grocers and Retail Merchants  
Association  
California Grocers Association  
California Retailers Association  
Connecticut Food Association  
Food Industry Alliance of New York State  
Georgia Food Industry Association  
Idaho Retailers Association  
Illinois Retail Merchants Association  
Massachusetts Food Association  
Minnesota Grocers Association  
Missouri Retailers Association  
Montana Retail Association  
Nebraska Grocery Industry Association  
Nebraska Retail Federation  
New Jersey Food Council  
New Mexico Retail Association  
Northwest Grocery Association  
Ohio Council of Retail Merchants  
Retailers Association of Massachusetts  
Rocky Mountain Food Industry Association  
South Dakota Retailers Association  
Texas Retailers Association  
Utah Food Industry Association  
Utah Retail Merchants Association  
Washington Retail Association  
West Virginia Retailers Association  
Wisconsin Grocers Association