April 9, 2012

Technical Release 2012-01
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, D.C. 20210

Re: Technical Release 2012-01, Frequently-Asked-Questions from Employers Regarding Automatic Enrollment, Employer Shared Responsibility, and Waiting Periods

To Whom It May Concern:

I submit this letter in response to the Frequently-Asked-Questions from Employers addressed in Technical Release 2012-01.

Approaches Outlined Would Increase Crowd-Out and Cost to Federal Government

The anticipated guidance outlined in the Notice could reduce the efficacy of the provisions in the Affordable Care Act (ACA) designed to ensure a strong employment-based coverage system and would result in reduced revenue and increased cost to the federal government.

The main purpose of the employer responsibility provisions in the ACA was to reduce crowd-out, or a shift from employment-based coverage to subsidized coverage in the exchanges or Medicaid. The presence of subsidized coverage in the exchanges will decrease the incentive for certain employers to continue to offer coverage. Employers are likely to drop coverage if the cost for an employee to purchase equivalent coverage in the exchanges plus the employer responsibility penalty is less than the cost of an equivalent employer premium (taking into account tax implications). Crowd-out is more likely when employers are not required to pay a penalty or to contribute a meaningful amount to the cost of covering their uninsured workers, because the cost of allowing their workers to be covered through subsidized coverage is lower.[1]

The Congressional Budget Office estimates that exchange subsidies would cost approximately $777 billion and penalty payments by employers result in $81 billion in revenue between 2012

[1] Ken Jacobs and Jacob Hacker, "How to Structure a 'Play-or-Pay' Requirement on Employers: Lessons from California for National Health Reform," UC Berkeley Center on Labor Research and Education and Berkeley Center on Health, Economic and Family Security Policy Brief, June 2009.

and 2021.[2] Any weakening of the application of the employer responsibility provisions could reduce enrollment in employment-based coverage and increase the cost to the federal government while also reducing revenue from penalties.

Below I respond to the questions and answers discussed in the Notice in more detail and with specific recommendations.

Q1: Automatic Enrollment

The automatic enrollment requirement for large employers is an essential part of the ACA and was designed to maximize coverage and maintain a strong employment-based health care system. We expect that fewer individuals would be enrolled in employment-based coverage in 2014 if the automatic enrollment provision is not implemented in a timely way. Some of these individuals would be uninsured and some would enroll in Medicaid, shifting costs that would otherwise be paid by employers onto the federal government, the states and the health care system.

Recommendation: Implement automatic enrollment provisions as soon as possible.

Q4: Look-back/ Stability Period for Existing Employees

The rationale for a look-back/stability period is faulty. The look-back period is designed to address the concern that “If employer-sponsored coverage were limited to employees who satisfied the definition of full-time employee during a month, employees might move in and out of employer coverage as frequently as monthly, which would be undesirable from both the employee’s and the employer’s perspective, and could also create administrative challenges for the State Exchanges.” (IRS Notice 2011-36) This conflates eligibility standards for employment-based coverage with the definition of full-time employment under the law. Employers currently set their own eligibility standards for health benefits and may continue to do so under the ACA. Employers can design eligibility criteria in a way that maximizes stability of coverage. Additionally, concern about churning between employment-based coverage and coverage in the exchanges does not apply to employers that do not offer coverage.

The look-back period is also designed to mitigate “uncertainty and inability to predictably identify which employees are considered full-time and, consequently, inability to forecast or avoid potential §4980H liability.” (IRS Notice 2011-36) The look-back period is unnecessary because employers have significant control over hours and hiring, two major factors in predicting liability. Furthermore, an important factor in unpredictability of liability, employee use of subsidies in the exchanges, would not be addressed by a look-back period.

Other models for implementing employer responsibilities that are simpler and shorter in length should be considered.

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[2] Statement of Doug W. Elmendorf, Director, Congressional Budget Office, “CBO’s Analysis of the Major Health Care Legislation Enacted in March 2010,” before the Subcommittee on Health Committee on Energy and Commerce, U.S. House of Representatives, March 30, 2011.

> "The Employer Spending Requirement of the San Francisco Health Care Security Ordinance (HCSO), effective in 2008… requires San Francisco employers to make health care expenditures to or on behalf of eligible employees based on the number of hours worked by the employees. Employers make these expenditures by, *inter alia*, paying for insurance directly, paying into medical reimbursement accounts, or paying into the City's Healthy San Francisco program… Employees are covered under the HCSO if they have been employed by an employer for at least 90 calendar days, work at least 8 hours per week within the city, and are not otherwise exempt from coverage. Eligible employers must begin making payments for eligible employees on the first day of the calendar month following 90 calendar days after a covered employee's first day of work. Once the waiting period is over, eligibility is determined based on the hours worked during that particular week. For employees whose hours fluctuate, eligibility is determined based on the average number of hours worked per week during the applicable calendar-year quarter."[3]

The San Francisco process has been proven administratively workable over the program's four year history, without creating an undue burden on employers.[4]

Recommendation: Calculate existing employees' full-time status retrospectively and apply penalties accordingly.

Q5: Full-Time Status for Newly-Hired Employees

<u>The approach suggested in FAQ-5 would allow employers under certain circumstances to have six months to determine whether or not an employee is full-time during which the penalty would not apply. If the first three-month period is deemed by the employer as not "representative of the average hours the employee is expected to work on an annual basis," employers would have an additional three-month period to determine whether a newly hired employee is considered to be full-time. The penalty would not apply during the additional three-month period, regardless of hours actually worked by the employee.</u> This approach would create the possibility for manipulation of the employer responsibility provisions by allowing employers to claim that the hours worked in the first three months are not representative in order to evade the penalties for some employees for a total of six months.

We predict that the approach discussed would significantly weaken the employer responsibility provisions in certain industries. In high-turnover industries, many employees will separate from employment by the end of the first six months. For example, in the restaurant industry which had a 75 percent average turnover rate in 2008 according to the National Restaurant Association, a large share of the new employees would be expected to separate from employment before the penalty requirement would go into effect, regardless of whether the employees are receiving subsidized coverage in the exchanges.

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[3] Donna Levitt, Manager, City and County of San Francisco Office of Labor Standards Enforcement, "Comments Regarding Notice 2011-36 Request for comments on Shared Responsibility for Employers Regarding Health Coverage," August 1, 2011.

[4] Carrie Hoverman Calla, William H. Dow and Arindrajit Dube, "How do Employers React to a Pay-or-Play Mandate? Early Evidence from San Francisco?" NBER Working Paper 16179, July 2010.

This is one example of how using a look-back period would reduce the efficacy of the employer responsibility requirements. Retrospectively determining employees' full-time status and applying penalties accordingly would account for any variation that occurred in new employees' schedules.

Recommendation: As recommended above for existing employees, new employees' full-time status should be determined retrospectively and penalties applied accordingly. If the proposed structure for determining full- and part-time status is retained and a second three-month determination period is permitted, the penalty should only be waived for that quarter if work hours are below the full-time threshold during the second three-month period.

Conclusion

The employer responsibility provisions are necessary to maintain employment-based coverage and minimize shifting of coverage and costs onto the federal government. These provisions are also necessary to leveling the playing field between firms that do and do not offer coverage. Limited application of the employer responsibility provisions would work against both of these goals.

Thank you for the opportunity to submit these comments.

Sincerely,

Ken Jacobs
Chair, UC Berkeley Center for Labor Research and Education