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

Sent via email to: notice.comments@irscounsel.treas.gov

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

The Retail Industry Leaders Association (RILA) appreciates the opportunity to provide input on issues related to the employers shared responsibility provisions in the Patient Protection and Affordable Care Act (PPACA). RILA is the trade association of the world's largest and most innovative retail companies. RILA promotes consumer choice and economic freedom through public policy and industry operational excellence. Our members include the largest and fastest growing companies in the retail industry – retailers, product manufacturers, and service suppliers. The retail industry is vital to our nation's economy, representing one of the largest industry sectors in the United States with nearly 15 million jobs.

RILA greatly appreciates the time officials with the Treasury, Labor, and Health and Human Services (HHS) Departments spent with several of our human resources and benefits executives on May 5, discussing the regulatory impact PPACA will have on our companies and the retail industry. This meeting was productive and included constructive dialog on various issues, which we highlight in this letter. RILA appreciates the on-going dialog department officials are having with our individual members, the retail industry and employers with variable workforces, including those represented in the Employers for Flexibility in Health Care Coalition.

Our comments address issues raised in Notice 2011-36 and others discussed in the May 5 meeting, including auto enrollment, the design of Exchanges and the affordability test. The retail industry has a high turnover rate and a large number of part-time, seasonal and temporary workers. Retailers want to continue to offer quality and affordable health care to their employees. RILA cannot stress enough the importance of providing employers with variable workforces with flexibility in complying with the various provisions of PPACA.

Definition of Full-Time Employees/Look-Back/Calculation of Hours
RILA appreciates the recognition of the unique challenges faced by employers of variable workforces in the Notice through the proposal of a look-back/stability period safe harbor method

in determining an employee's full-time status. The proposed three- to twelve-month look-back (measurement) period followed by a stability period is a flexible approach that can avoid the revolving door, or churn, effect of employees bouncing between employer-sponsored plans and the Exchanges. The intended stability would benefit employees by maintaining consistent and predictable coverage, while also benefiting employers by avoiding the burdensome administration costs associated with a frequently changing employment status.

RILA believes employers should have the flexibility to use the look-back period for new part-time, seasonal and temporary hires. The flexibility of using an up to a year-long look-back (measurement) period ensures that the employee intends to be an on-going employee of the employer. Additionally, during the look-back and stability periods, employees should be required to maintain a true employment connection with an employer and continually meet a minimum work requirement. This connection and minimum work requirement could be defined as meaning the employee is receiving a paycheck from the employer and meets a reasonable minimum hours-worked threshold (i.e. students who work full-time part of the year during school breaks and holidays). Benefit costs are a significant expense to the employer and it is reasonable for an employer to receive some measure of contribution to the company (time and productivity) from the employee before incurring these expenses.

Employers must have the flexibility to determine full-time, part-time, seasonal and temporary status based on the constraints of their current payroll and hours tracking systems, and business preferences and needs provided that the method used is consistent with the spirit and intent of the law. Due to the nature of the retail industry, hours worked can fluctuate based on employee preference and business needs (i.e. busy holiday and vacation seasons). Retail employees are often students, retirees, and parents who want a secondary income while their kids are in school. These types of employees frequently change their availability to work based on their personal situations on a weekly basis – the flexibility that often draws individuals to seek employment in the retail industry.

Employers often maintain three distinct and separate systems for separate functions: time and attendance; payroll; and human resources information system (HRIS). Tracking hours of service is typically done in an employer's HRIS. Hours tracking systems, including time and attendance systems and the interfaces into the payroll and HRIS systems, have evolved over many years, and are extremely complex and expensive to develop and implement. It can often take up to nine to twelve months to implement or make changes to such a system.

Regulations must take into account the nuances between employers' payroll, time reporting and HRIS systems. These systems vary widely from employer to employer in the way hours are calculated and may not measure employee time on an actual monthly or weekly calendar basis. To accommodate the variety of employer systems, RILA recommends permitting employers to measure hours in terms of a pay period – whether measured on a weekly, bi-weekly, bi-monthly basis – and not over a calendar month (i.e. worked an average of 60 hours each pay period over 26 pay periods beginning with date of hire). Hours could also be measured based on aggregate hours worked over a period (i.e. worked 1560 hours over a 52 week period beginning with the date of hire). Flexibility in measuring hours of service is critical to minimize the amount of necessary system programming – both in terms of time and expense.

The definition of hours of work should be consistent with the already established definition of hours under ERISA's 1000 hour rule, which clarifies which "hours" count towards hours of work for the purposes of establishing plan eligibility. Most tracking systems are already programmed to count hours based on the ERISA definition of hours worked. Regulations should be clarified to exempt unpaid hours or hours paid by a third party (i.e. state disability) from the calculation of hours of work. It is difficult for employers to develop a tracking system, especially as it relates to unpaid, but still creditable, hours such as FMLA. Much of this ends up being maintained manually creating an increased risk of error.

90-Day Waiting Period

Notice 2011-36 seeks additional guidance from stakeholders on the 90-day waiting period and its interaction with the employer responsibility provisions. RILA believes employees must maintain a consistent number of hours worked throughout the 90-day waiting period to be eligible for plan benefits. For employers whose plan eligibility includes a probationary period separate from the 90-day waiting period, an employee should be required to maintain a consistent number of hours worked throughout the probationary and waiting periods. We also believe that upon completion of the look-back and the 90-day waiting period, there should be a reasonable administrative period of up to 45 days to enable employers to enroll employees in plans, consistent with the currently established carrier systems, plans and policies.

Additionally, the 90-day period should be consecutive must restart upon rehire and employers must not be expected to look back to prior terms of employment. Having to account for prior periods of employment would be difficult, especially since most human resources information systems archive history after a certain point and when systems are upgraded, history is often left in the legacy (previous) system. For these reasons, the history is often not available to the new system's processing logic.

As noted in the above section, employers should have the flexibility to use the look-back period for their part-time, seasonal and temporary workers. Employers who currently offer coverage to this sector of the workforce may be less likely to continue to offer coverage if a look-back period is not available. In addition, while we continue to stress flexibility, coverage offered to part-time, seasonal and temporary workforces should not be subject to the 90-day waiting period. Inflexibility may cause employers to discontinue coverage to these employees.

Penalties

Section 4980H of the Internal Revenue Code imposes a penalty on employers with more than 50 full-time employees if at least one full-time employee obtains subsidized Exchange coverage and the employer does not offer its full-time employees group health plan coverage or the coverage offered fails PPACA's affordability or value tests. We welcome the opportunity to raise several issues about the imposition of penalties on employers. Our comments addressing the calculation of the affordability test and minimum value standard can be found at the end of this letter.

RILA believes penalties should not be applied during the look-back (measurement), probationary and wait periods. The purpose of having these periods is to determine whether an employee meets the definition of a full-time employee and is eligible for coverage under an employer's plan. Additionally, while we continue to stress flexibility, seasonal employees should not be included in the definition of full-time employee when calculating an employer's tax liability. Should seasonal employees be included in this calculation, employers may choose to decrease the length of employment or eliminate this category of employment altogether. We believe part-time, seasonal, temporary, ex-patriots and others not intended to be included in the definition of a full time employee should be exempted from the calculation of an employer's tax liability.

RILA appreciates the clarification that employers may avoid penalties if they provide coverage to "substantially all" employees. With workforces of thousands of variable categories of employees, spanning multiple states, it is inevitable that our member companies will be subjected to calculations of penalties that may not be appropriate or accurate. For this reason, RILA supports the establishment of an administrative hearings and appeals process beyond the scope of safe harbors.

Additionally, we believe employers should be provided with the flexibility to meet the requirement for offering employees the opportunity to enroll in coverage. Regulations should be drafted to provide clear and consistent guidance on what an "offer of coverage" means, while providing employers with the flexibility to adhere to this requirement within their current benefits practice.

Automatic Enrollment

While a request for comments on the development of the Department of Labor's regulations regarding automatic enrollment (section 1511) was not included in Notice 2011-36, RILA wishes to take this opportunity to raise several issues important to employers in the retail sector.

The statute is silent on the effective date of section 1511. Auto enrollment, especially when combined with the hours tracking for full-time employment determinations, will likely require expensive and time consuming system programming changes to implement. Employers need adequate time from the point at which regulations are issued to allow for implementation. Depending on the complexity of an employer's system, such system changes could reasonably take between nine and twelve months to define system requirements, develop necessary system coding, test and implement. RILA believes the Department of Labor should not implement the auto enrollment rules until the essential benefits and minimum coverage standards under PPACA become effective in 2014. At a minimum, these rules should not be effective any earlier than twelve months after the final rules are issued by the Department of Labor.

The statute is also unclear whether the definition of full-time employee is intended to apply to the auto enrollment rules. In fact, a reasonable conclusion is that it was not intended to define "full-time employees" for purposes of auto enrollment because section 1513 does not amend the Fair Labor Standards Act; rather it amends the Internal Revenue Code and relates to the definition of full-time employee for purposes of imposing penalties for failure to offer full-time employees health care coverage. The interplay of the auto enrollment with regulations to administer the determination of full-time status is crucial to employers with large populations of employees who do not work a traditional 40 hour full-time week, especially when defining the measurement period for tracking hours. The possibility of the 30-hour rule combined with auto enrollment causing people to gain and lose eligibility for, and enrollment in, an employer-sponsored plan from one measurement period to the next could lead to complex and confusing administration for Exchange and COBRA coverage, and for employers and employees including annual deductibles and annual out-of-pocket maximums.

Automatic enrollment into health coverage will be notably different from automatic enrollment into retirement plans. For lower paid employees living paycheck-to-paycheck, payroll deductions for health care will be notably larger than those for a 401(k) plan, and therefore have a greater financial impact on them and their decision to consider opting-out. Invariably, employers will be dealing with employees who "did not know" they were going to be auto enrolled and want to opt-out, especially in retail industry which employs younger individuals and those new to the workforce who are not familiar with benefits elections, so guidance on employee notices and opt-out provision safe harbors is crucial.

In implementing an opt-out provision, it is critical that the overlap of these rules with section 125 of the Internal Revenue Code and COBRA be carefully reviewed and addressed. RILA believes employers should have the flexibility to provide newly hired employees with an adequate timeframe of opting out of coverage that is consistent with an employer's pay periods. Additionally, employers should be given the flexibility to treat the election to opt out as being retroactive to the initial enrollment, thus treating the coverage as never having taken effect –or – as a prospective election change so that employers' payroll system constraints do not have to find a way to issue refunds of premium payments made up until the opt-out. It is also critical to clarify that an opt-out is not a COBRA qualifying event.

Many employers offer a choice of health plan options to their employees. This creates a dilemma as it relates to determining into which plan an employee should be automatically enrolled. RILA recommends that employees who do not specifically request otherwise be enrolled in the most affordable, lowest-cost option available to that employee.

Communication with Exchanges

HHS will soon promulgate regulations for implementing the establishment and operation of the Exchanges. National, multi-state employers have a vested interest in the establishment of federal standards applicable to state, regional and national-level exchanges, wherever appropriate, to ensure:

- Consistency in exchange administrative functions to ensure uniform application and reporting requirements;
- Streamlined communication channels between employers, plan administrators and exchanges; and
- Clear guidelines regarding each party's responsibilities related to enrollment periods and status change events.

Section 1321 provides state flexibility in the operation and enforcement of Exchanges and related requirements. States may implement a state-level, regional or, for states which opt-out or fail to meet HHS guidelines, a national Exchange. We recognize that the various Exchange options provide flexibility to states while ensuring the law is fully implemented. From a large employer perspective, a variety of options without federal standards cripple employers' ability to navigate multiple state structures and communication requirements. These are the same issues the preemption provision under ERISA has mitigated. Absent federal standards and an IT solution, allowing states to choose the structure and operational framework will subject national employers to numerous sets of operating and communication requirements that will increase costs, administrative complexity and ultimately hinder large employers' ability to provide access to affordable employer-sponsored coverage.

Although we recognize there likely will be some degree of variance in the information provided to an individual based on the state in which he or she lives, we support a federal IT solution that will provide a uniform interface to coordinate eligibility, plan options and enrollment information and support an online enrollment process. Should individual states have to build their own IT infrastructure, we hope federal regulators will provide a template or list of approved software vendors to mitigate the risk of inconsistent information and format provided to employees of multi-state employers. In addition to providing useful information to consumers, the same IT solution may be established so as to provide secure "administrator access" to employers to satisfy employer reporting and payment requirements and help monitor employees' current participation status in an Exchange.

Retailers typically have high turnover rates and a transient employee base, resulting in frequent life status events. Standardized forms and notices to facilitate enrollment, plan offerings and communication to employees, is necessary for multi-state employers in light of their size, complexity and workforce profile. For example, our members welcome standardized rules and materials in the following areas:

- Uniform enrollment rules that contemplate permissible election changes;
- National annual open enrollment periods rather than varying enrollment periods by state or region;
- Standard (model) notice for employers to notify employees of Exchange options and resources, open enrollment period, eligibility for participation, etc.; and
- Similar to the Certificate of Creditable Coverage or National Medical Support Order Notice forms, standardized forms to facilitate communication between employers, plan administrators and Exchanges of status change events, loss of eligibility and other qualifying events to help manage the special enrollment process and streamline communication for all parties.

Affordability Test and Minimum Value Standard

As noted in the above penalties section, employers who do not offer full-time employees with an affordable health-plan option will be subject to penalties for each full-time employee who receives a federal tax credit or subsidy to buy coverage through an Exchange because his or her employer plan is deemed unaffordable. RILA remains concerned about how the affordability test will be implemented and how the minimum value standard will be calculated for an employer's plan.

To qualify for the credit, employees must disclose household income information (adjusted gross income - AGI) to an Exchange and an Exchange would then "deem" a plan unaffordable. By nature, retail sector employees do not work a consistent number of hours from week to week and are, by design and FLSA definition, non-exempt, hourly employees. Retailers employ seasonal workers, recently graduated or certified students, parents who want a secondary income while their children are in school and people who are in search of supplemental income. The hourly rate, commission structure and/or tip revenue is based on hours worked and is variable at best.

By law, employers do not and should not know an employee's household AGI. Under PPACA, employers would be forced to make what possibly amounts to inaccurate estimates based on family structure. It also starts a dangerous modeling structure by employers who are assessing potential future risk of failing the affordability test year over year. Today, using company salary data, a report by bSwift estimates that over 52 percent of employers will have more than 5 percent of employees in the "danger zone" of paying more than 9.5 percent of their compensation for health premiums. For retailers, where lower salaries of field employees are more the norm, the affordability provision has even more costly consequences.

Once an employee is deemed eligible for coverage under an Exchange, the Exchange would notify the employer. This administrative step has cost repercussions on a number of levels. First and foremost, the added administrative burdens that must be addressed by employers, who by nature, have locations and employees in all 50 states. The Exchange process, by design, leads us to believe that each state's regulations around affordability could potentially be different, leading to a large administrative burden for benefits departments' corporate-wide.

In the assumption that all retailers continue to offer health insurance, a number of unanswered questions remain regarding this 9.5 percent of household AGI. Is the affordability test, based on the prior year's AGI, fair in that it is not real time and does not account for current salary and household income? If an employer's plan is deemed unaffordable, and the penalty is assessed, at what point is that updated, after taxes are filed, even if this is toward the end of a plan year?

There is a very large concern that prior years' household AGI calculation is not a true picture of one employee's current earnings. Should a person be unemployed or under employed for the better part of a year, the AGI for that family will not be noted at a true level, given the new position and health plan offering, unless the company takes the approach of offering a contribution based on the "lowest common denominator." In the retail industry, this would be the 30 hour per week hourly employee in the lowest minimum wage state. This would mean that the $7.25/hour employee has the same premium cost for a single employee as the Senior Accountant at $60,000. There is an insidious discrimination toward lower paid individuals in this instance. In addition, how are the instances of disability, FMLA leave, and religious objections to be taken into account for AGI and what if a person does not file a tax return? How will the IRS/HHS handle these cases?

A large concern is the ability of an individual/family to lower reported household AGI each year. Numerous tax breaks (tax credits, deductions, and other tax benefits) are reduced or eliminated if a taxpayer's AGI or modified AGI exceeds specific thresholds. Tax experts frequently give advice on how to reduce annual AGI. Many whose income without any planning would be in the range of a threshold may be able to use one or more strategies to keep AGI below the applicable level. For example, converting taxable interest to tax-exempt interest or income; pay off debts; increase contributions to an HSA (subject to PPACA limits); defer year-end bonuses; pay back alimony; pay moving expenses and increase contributions to retirement plans. In offering proper 401k and retirement plans, and a potential auto enrollment for these in continuous discussions, there is the ability for the employee to prepare for retirement but penalize the employer for offering a vehicle for health and financial security.

RILA recommends defining affordability in a manner that does not impact the privacy of employees and their families or the administrative burden on employers any more than is absolutely necessary. A premium affordability measure based on an employee's household AGI seems counter to the ultimate goals desired under PPACA in terms of being truly "affordable" to the consumer. The definition of "affordable" needs to be clear, concise, have easy defined regulations and consistent and efficient communication as it relates to our full-time, eligible employees.

RILA remains confused as to what constitutes the minimum value standard. Section 1401 of PPACA defines the minimum value standard as: an employer-sponsored plan's share of the total allowed cost of benefits provided under the plan is not less than 60 percent of such costs. The law was not intended to prescribe a mandated benefit package on employer-sponsored plans. Should this 60 percent test be deemed as an actuarial value, it would go against the intent of the law.

Conclusion

RILA appreciates this opportunity to provide feedback to the various departments and agencies charged with implementing the employers shared responsibility provisions and others in PPACA affecting our member companies and the retail industry. RILA will continue to stress to the Administration and Congress the importance of providing flexibility, to the fullest extent, in all regulations affecting employers of variable workforces. RILA looks forward to continuing to work with regulators and policymakers as this process unfolds.

Please direct questions or requests for further information about this comment letter to Christine Pollack, Vice President of Government Affairs, Retail Industry Leaders Association (RILA) at Christine.pollack@rila.org or 703-600-2021.