NATIONAL WOMEN'S LAW CENTER
EXPANDING THE POSSIBILITIES

VIA ELECTRONIC MAIL

December 13, 2011

CC:PA:LPD:PR (Notice 2011-73)

Internal Revenue Service
Room 5203
P.O. Box 7604
Ben Franklin Station
Washington, D.C. 20044

Re: Notice 2011-73, Request for Comments on Health Coverage Affordability Safe Harbor for Employers (Section 4980H)

To Whom It May Concern:

The National Women's Law Center (the Center) is pleased to submit the following comments in response to the above-referenced request for comments issued by the Internal Revenue Service (IRS) on October 3, 2011.

Since 1972, the Center has worked to protect and advance the progress of women and their families in core aspects of their lives, with an emphasis on the needs of low-income women. We strongly support the coordinated efforts of the Department of Health and Human Services (HHS) and the Department of the Treasury (Treasury) to implement the Patient Protection and Affordable Care Act (ACA) and make quality, affordable health insurance available to millions through Medicaid, employer-sponsored coverage, and the new system of Exchanges.

The Center supports the establishment of an affordability safe harbor to protect employers from liability for penalties under section 4980H of the ACA when an employee qualifies for subsidies through an Exchange because his or her total household income is lower than the wages paid by the employer. An affordability safe harbor can encourage employers to offer health insurance to their employees by preventing the assessment of a penalty against an employer who has ensured that coverage is affordable based on employees' W-2 wages. In addition, such a safe harbor will protect employees' privacy by avoiding the need for disclosure of information that typically is not (and should not be) known to an employer, including the modified adjusted gross income of an employee and the employee's spouse and/or dependents.

However, we are concerned that the safe harbor, as proposed, could have the unintended results of 1) making employer-sponsored coverage less affordable for employees and their families, and 2) creating a tax loophole that allows employers to offer unaffordable coverage without paying the required tax penalty.

Accordingly, we recommend below several changes and clarifications to strengthen the proposed safe harbor and ensure that it reinforces, rather than undermines, the goals of the ACA.

I. The safe harbor should not require an offer of dependent coverage, to avoid creating an incentive for employers to offer unaffordable dependent coverage that would limit access to affordable coverage through the Exchange.

We recommend that, for purposes of the safe harbor, the employer be required to offer coverage only to full-time employees, and not to their dependents.

Section 4980H of the ACA subjects applicable large employers to an assessable payment if any full-time employee receives a premium tax credit or cost sharing reduction and the employer "fails to offer to its full-time employees (and their dependents) the opportunity to enroll in minimum essential coverage under an eligible employer-sponsored plan," or the plan offered is either unaffordable or does not provide minimum value.

To qualify for the proposed safe harbor, an employer would be required to "offer its full-time employees (and their dependents) the opportunity to enroll in minimum essential coverage under an eligible employer-sponsored plan," and ensure that "the employee portion of the self-only premium for the employer's lowest cost coverage that provides minimum value…[does] not exceed 9.5 percent of the employee's W-2 wages."

Encouraging employers to offer health coverage to dependents of their employees is laudable. However, we are concerned that if employers qualify for the safe harbor only if they offer coverage to dependents, but the coverage is considered affordable so long as the cost of self-only coverage for the employee is less than 9.5 percent of W-2 wages, employers will be incentivized to maintain family coverage without contributing much to its cost. As a result, the cost of enrolling dependents could exceed 9.5 percent of W-2 wages and, in many cases, exceed 9.5 percent of household income as well. Moreover, under the proposed affordability test at 26 CFR 1.36B-2(c)(3)(v)(1), family members in those circumstances would not be eligible for tax credits in the Exchange because the employer-sponsored coverage would be deemed affordable for them based on the cost of self-only coverage for the employee. Thus, an expensive offer of family coverage could limit access to affordable coverage more than no offer of family coverage, contrary to the intent of the ACA.

As detailed in our comments in response to IRS REG-131491-10, we believe that the affordability test proposed at 26 CFR 1.36B-2(c)(3)(v)(1) represents an incorrect interpretation of the relevant provisions of the ACA, and we strongly urge Treasury to adopt a final rule that bases the determination of whether employer-sponsored coverage is affordable on the contribution required for an employee to cover all eligible family members. However, particularly if Treasury does not adopt such a rule, we recommend that the final affordability safe harbor require an employer to offer its full-time employees, but not their dependents, the opportunity to enroll in minimum essential coverage under an eligible employer-sponsored plan. (We want to make clear that while such a safe harbor policy may reduce some of the negative consequences of the affordability test that Treasury has proposed at 26 CFR 1.36B-2(c)(3)(v)(1), it cannot serve as a replacement for a final rule that determines affordability of employer-sponsored coverage based on the cost to cover all eligible family members. Regardless of whether the affordability safe harbor requires an offer of coverage to dependents, many employers will offer family coverage that costs more than 9.5 percent of household income.)

This proposal is consistent with section 4980H of the ACA, as the statute would not in fact impose a penalty against an employer offering minimum essential coverage only to full-time employees, and not their dependents, so long as the coverage offered to the employee is affordable and provides minimum value. Specifically, while paragraph (a)(1) of section 4980H requires an offer of coverage to full-time employees (and their dependents), employers who do not offer coverage are required to pay a penalty only if, as described in paragraph (a)(2), at least one full-time employee receives a premium tax credit or cost-sharing reduction. If the self-only coverage is affordable and meets minimum value for all full-time employees, then no full-time employees will be eligible for premium tax credits or cost-sharing reductions – and the employer will not owe any payment under section 4980H. Thus, the safe harbor should make clear that any potential payment assessed against an employer will be based only on the offer of coverage to the employee, and should not require the employer to offer coverage to the dependents of its employees.

II. The Safe Harbor Should Be Determined at the End of the Year as Proposed and Mid-Year Adjustments Should Be Pro-Rated by Month.

Page 4 of Notice 2011-73 notes that while "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." We find this language somewhat ambiguous, but read the full paragraph to mean that employers may prospectively take action and make changes during the year to ensure that the requirements of the safe harbor are met at the year-end determination, and not to establish a method by which employers can escape liability based on prior projections. We recommend that the final safe harbor provisions clarify that the determination of liability under section 4980H will be based on actual health insurance contributions and actual wages, not projections.

Regarding the same paragraph on page 4 of the Notice, we have concerns regarding the suggestion that employers "would be permitted to make reasonable and necessary adjustments for pay periods so that the employee contribution does not exceed 9.5 percent of the employee's W-2 wages." It is unclear whether this language is meant to address situations in which an employee's wages change and the employer adjusts the health insurance contributions accordingly, or if it is contemplating mid-year changes in contributions initiated by an employer without changes in wages. The latter scenario could create a significant loophole allowing an employer to offer unaffordable coverage, lower the contribution after employees are deemed eligible for premium tax credits, and not be liable for an assessed payment.

The Notice specifically requests comments on how wages and employee contribution amounts should be determined in special circumstances. We recommend prorating the affordability safe harbor determination when there is a change in the employee contribution or wages during the tax year.

For example, consider an employer that has an employee with $20,000 in annual wages. The employer offers coverage as of January 1, 2014 that costs the employee $183 a month and changes the employee contribution to $75 a month starting October 1. If the employee has no other household income, then the employee may have been deemed eligible for a premium tax credit starting January 1, because the contribution was 11 percent of $20,000. If the safe harbor

determination does not involve proration, the annual wages of $20,000 and annual employee contribution of $1,872 (9.36% of wages) would allow the employer to meet the safe harbor requirements – even though the employee received premium tax credits and the employer was aware that the premium for nine months was above 9.5 percent of the employee's monthly wages. Employers seeking to minimize both their own premium contributions and their liability under section 4980H could charge a high contribution during open enrollment so employees receive premium tax credits, then lower the contribution mid-year while expecting many employees to remain enrolled in coverage through the Exchange.

This loophole could be closed by prorating the safe harbor determination if there are changes in the employee contribution over the year. In the example above, compliance would be determined based on two calculations: one to determine whether the employee contribution exceeded 9.5 percent of monthly wages when the contribution was $183 per month, and a similar calculation for the period when the contribution was $75 per month. The safe harbor would apply only for October through December, and the employer would be assessed a pro-rated payment for January through September. A model that prorates the affordability safe harbor determination could prove to be useful in a number of the specific circumstances identified in the Notice – e.g., for employees who are employed by an employer for less than a full year and situations in which the plan year is not a calendar year – as well as to account for changes in wages or hours worked by an employee.

The Center appreciates this opportunity to comment.

Sincerely,

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