

NATIONAL COORDINATING COMMITTEE FOR MULTIEMPLOYER PLANS

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Centers for Medicare & Medicaid Services
Department of Health and Human Services
Room 445-G
Hubert H. Humphrey Building
200 Independence Avenue, SW.
Washington, DC 20201

Re: Affordable Care Act¹

CMS-2324-P

Proposed Rule: Medicaid, Children's Health Insurance Programs, and Exchanges: Essential Health Benefits in Alternative Benefit Plans, Eligibility Notices, Fair Hearing and Appeal Processes for Medicaid and Exchange Eligibility Appeals and Other Provisions Related to Eligibility and Enrollment for Exchanges, Medicaid and CHIP, and Medicaid Premiums and Cost Sharing

Dear Ladies and Gentlemen:

The National Coordinating Committee for Multiemployer Plans (the "NCCMP") is pleased to provide these comments regarding the Proposed Rule. This letter focuses on the provisions of the proposed rule related to Certified Application Counselors (45 CFR § 155.225) and Authorized Representatives (45 CFR § 155.227) as they would apply to multiemployer plans and plan participants and beneficiaries. Specifically, we request that the certification process and compliance agreements for both counselors and authorized representatives be available at the federal level, not the state level, for multiemployer plans because such plans are subject to federal regulation under ERISA, the Internal Revenue Code, and the Taft-Hartley Act, not to state insurance regulation.

The NCCMP is the only national organization devoted exclusively to protecting the interests of the approximately 26 million American workers, retirees, and their families who rely on multiemployer plans for health and other benefits. The NCCMP's purpose is to assure an

¹ The Affordable Care Act refers collectively to the Patient Protection and Affordable Care Act (Pub. L. 111-148) and the Health Care and Education Reconciliation Act (Pub. L. 111-152).

environment in which multiemployer plans can continue their vital role in providing benefits to working men and women. The NCCMP is a nonprofit, non-partisan organization, with members, plans, and plan sponsors in every major segment of the multiemployer plan universe, including in the agricultural, airline, building and construction, entertainment, health care, hospitality, longshore, manufacturing, mining, retail food, service and trucking industries.

Introduction

One of the crowning achievements of collective bargaining over the past 50 years is the thousands of labor-management, multiemployer health and welfare trust funds that provide to covered, union-represented workers and their dependents various benefit coverages, including medical, hospitalization, preventive and wellness care, prescription drugs, dental care, and vision care. These trust funds are often referred to as “Taft-Hartley funds” because they are regulated by the Labor Management Relations (“Taft-Hartley”) Act of 1947, as well as by the Employee Retirement Income Security Act (“ERISA”) and the Internal Revenue Code (“Code”). We note, however, that some single employer plans may operate as joint labor-management funds and therefore believe the more appropriate term is “multiemployer” plans with respect to comments contained herein.

Multiemployer plans provide health and welfare plan coverage to plan participants and their beneficiaries pursuant to the negotiated wages, hours, and other terms and conditions of employment (including requiring contributions to be made to a multiemployer benefit trust) of a collective bargaining agreement between one or more unions and more than one employer.. Even for employees who are not union members but whose work is covered as part of a certified bargaining unit, existing labor law provides that discussions of employee benefits are a mandatory subject of bargaining and therefore subject to negotiation under their status as the statutory bargaining agent. The ACA did not repeal the Labor Management Relations Act. Relationships are established between employers and employees under the Taft-Hartley Act, and these relationships should continue to be recognized in regulations implementing the ACA.

Multiemployer plans often provide coverage to employees of contributing employers who work in diverse geographical areas. For example, a plan in the Northeast might cover workers in several states. Additionally, many multiemployer plans are national trust funds and cover workers throughout the country. Consequently, the jurisdiction of the funds cross state lines. Because the plans are governed by ERISA, they are not subject to state insurance law regulations.

Health and welfare trust funds cover workers in industries as diverse as building and construction, transportation, retail, food, clothing, textiles, service, mining, entertainment, hotel and restaurant, maritime, longshore, and manufacturing. But for these trust funds, millions more

working families would be uninsured and at risk for financial ruin in the event of a serious illness. The transient, project-based, mobile and seasonal employment patterns that characterize many of these industries would prevent workers from obtaining health coverage absent a central, pooled fund through which portable coverage is provided to workers as they move from employer to employer.

Multiemployer plans are subject to the continuation coverage provisions of the Consolidated Omnibus Budget and Reconciliation Act (“COBRA”). Moreover, multiemployer plans have a long tradition of providing additional, non-mandated, coverage extension through a variety of means, including dollar or hour banks, which allow individuals to pay for coverage based on banked eligibility, or self-pay for periods longer than the 18-months mandated for job loss under COBRA. Generally, self-pay provisions in multiemployer plans may also provide coverage at a reduced rate for a portion of that time.

Certified Application Counselors and Authorized Representatives

The Proposed Regulation would provide that an Exchange must certify staff and volunteers of Exchange-designated organizations as Certified Application Counselors, to provide information about the Exchange and insurance affordability programs (e.g., the premium assistance tax credit that will assist lower-income individuals in buying Exchange coverage), help individuals and employees apply, and help facilitate their enrollment. The proposed rule does not list the types of organizations that Exchanges must or may designate for this program.

HHS also proposes to establish a minimum standard for the designation of an authorized representative who may act on an individual’s or employee’s behalf. Specifically, an Exchange must permit individuals and employees (e.g., in the SHOP exchange) to designate an individual or organization to act responsibly on their behalf in assisting with the individual’s application and renewal of eligibility and other ongoing communications with the agency. The preamble to the proposed regulation provides that an Exchange must not restrict the option to designate an authorized representative to only certain groups of individuals or employees. However, this is not included in the regulatory language. The designation of authorized representative must be in writing and signed by the individual.

An authorized representative may complete and sign an application on the individual’s behalf, or submit a renewal form. They may receive copies of all applicable notices and act on behalf of the applicant in all other matters with respect to the Exchange. The authority granted to the authorized representative continues until it is revoked in writing by the individual.

As a condition of becoming a Certified Application Counselor or an Authorized Representative, the proposed rules provide that an Exchange must obtain a signed agreement from the person (or organization) that he or she will comply with the rules governing standards of certification. These rules include registration with an Exchange, training, disclosure of relationships with

QHPs or other potential conflicts of interest, compliance with rules concerning privacy and security of information, agreement to act in the best interest of the applicants, compliance with applicable state law, and providing information in accordance with the Americans with Disabilities Act, as applicable. Multiemployer plans, as group health plans, are covered entities under the HIPAA privacy and security regulations and thus already are obligated to protect the privacy and security of protected health information.

Recommendations

We have the following recommendations regarding Certified Application Counselors and Authorized Representatives:

1. Multiemployer plans should be explicitly listed among the organizations that would be recognized by HHS or an Exchange to provide plan participants and beneficiaries with information about Exchange options and insurance affordability programs. In many cases plan participants and beneficiaries will either have questions about Exchanges and how they relate to multiemployer plans, or may need assistance in transitioning from coverage under the multiemployer plan to an Exchange. Consequently, it is important for multiemployer plans to be able to assist individuals in understanding their potential eligibility for Exchange coverage and applying for such coverage if appropriate. The unique structure of multiemployer plans are often misunderstood by those unfamiliar with such plans; multiemployer plans are in the best position to assist plan participants and beneficiaries in addressing issues associated with Exchange coverage.
2. Compliance agreements for Certified Application Counselors and Authorized Representatives should be available directly from HHS, instead of state Exchanges, for entities such as multiemployer plans that are subject to federal regulation under ERISA, the IRC, and the Taft-Hartley Act and not to state insurance regulation. The relationships between plans and plan participants and beneficiaries established under the Taft-Hartley Act should continue to be recognized in regulations implementing the ACA.

Conclusion

We greatly appreciate the opportunity to comment on the proposed rules as they may apply to multiemployer plans and are more than happy to discuss any questions you may have regarding these comments.

Respectfully submitted,



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