

NATIONAL COORDINATING COMMITTEE FOR MULTIEMPLOYER PLANS

815 16TH STREET, N.W., WASHINGTON, DC 20006 • PHONE 202-737-5315 • FAX 202-737-1308



MARK H. AYERS
CHAIRMAN

RANDY G. DEFREHN
EXECUTIVE DIRECTOR
E-MAIL: RDEFREHN@NCCMP.ORG

Submitted Electronically via
Notice.comments@irs.counsel.treas.gov.

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Internal Revenue Service
CC:PA:LPD:RU (Notice 2011-28)
Room 5203
PO Box 7604
Ben Franklin Station
Washington, DC 20224

Re: Notice 2011-28 - Interim Guidance on Informational Reporting to Employees of the Cost of Their Group Health Insurance Coverage

Ladies and Gentlemen:

As you know, the Affordable Care Act required employers to report the aggregate cost of employer-sponsored health coverage to employees on the Form W-2 for wages earned in 2011. In Q&A 17 of Notice 2011-28, that requirement was modified to provide:

If the only applicable employer-sponsored coverage provided to an employee is provided under a multiemployer plan, the employer is not required to report any amount under § 6051(a)(14) on the Form W-2 for that employee.

Notice 2011-28 also invites comments on these issues, including those unique to employers that contribute to multiemployer plans. In particular, Treasury and IRS have requested comments on issues that would arise in applying the reporting requirements to employers contributing to multiemployer plans (see Q&A-17), such as the potential methods by which the coverage provided to an employee could be allocated among the contributing employers and the potential methods by which contributing employers could obtain the requisite information to report the reportable cost. We are pleased to submit this letter in response to your invitation.

Background

The National Coordinating Committee for Multiemployer Plans (the NCCMP) is the only national organization devoted exclusively to protecting the interests of the approximately twenty-six million Americans – active workers, retirees, survivors and their families - who rely on

multiemployer plans for retirement, health and other benefits. The NCCMP's purpose is to assure an environment in which multiemployer plans can continue their vital role in providing comprehensive 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 airline, building and construction, entertainment, health care, hospitality, longshore, manufacturing, mining, retail food, building services and trucking industries.

The overwhelming majority (upwards of ninety percent) of participants in multiemployer plans are employed by tens of thousands of small employers. Employers who contribute to multiemployer plans for employees that may work for them for brief periods of time, and employees with multiple employers, none of whose contributions, on their own, would result in eligibility for health benefits from these plans, present special problems with respect to the Act's reporting requirements. Furthermore, while the ostensible reason for showing this information is for employees to better understand the value of their employer sponsored health benefits, receiving a multiplicity of W-2 notices attributing partial, overlapping or excessive value to the employees' health benefits would be more likely to confuse them than to help them become more informed participants in the health care system.

The NCCMP commends the Treasury and IRS for **reserving** on the question of how the W-2 reporting works in multiemployer situations. The complexity in the multiemployer situation is too significant for the IRS and Treasury to offer effective guidance without in-depth study. We also have some thoughts about alternative approaches that might be workable approaches to resolving this dilemma.

Recap of General Multiemployer Issues

The main reason why employer reporting on multiemployer coverage (either to employees or to IRS) is problematic is that the contributing employers have little or no information about the health coverage that their employees receive under multiemployer plans, or even whether the employees with respect to whom they contribute earn sufficient service to qualify for that coverage. Since the employees may be quite mobile, switching frequently among contributing employers and even moving in and out of plan coverage, and the employers themselves may be one or two people who sometimes hire others and sometimes are hired by others, plans themselves would be significantly challenged to determine what part of an employee's coverage during a year was attributable to which employers.¹

Unlike employees for whom the employer may provide health benefits in a more traditional, single-employer setting, the collective bargaining nature of such contributions and the specific allocations of portions of the employees' wage package, many if not most of which are voted on by the employees themselves, multiemployer plan participants are already acutely aware of the value and costs of such benefits for themselves and their families.

¹ In a 1997 *Benefits Law Journal* article, Judy Mazo described the special situation of multiemployer health plans and their contributing employers in some detail. Despite the intervening changes in laws, technology and the delivery of health care, it still gives a good picture of how those plans work.

When employees receive coverage through a multiemployer plan, the plan pools contributions from all employers and pools the employees' service with all of the employers for eligibility purposes, so that the "industry" provides the coverage to people who have the requisite degree of service in the industry, although not with any one employer. Issues specific to multiemployer plans include how to resolve the lack of knowledge by the individual employer as to whether an employee actually achieved eligibility under the health plan; lack of knowledge as to whether the individual has single or family coverage; lack of knowledge as to the value of coverage, and the share that can be assigned to each employer, until several months after year end; and lack of alignment of some plan years with the taxable year. Additionally, because eligibility for most multiemployer plans is established at a level which is attainable for the majority of participants, individuals with significant seniority or those who work significant amounts of overtime make contributions above the minimum eligibility threshold. Although providing additional funding through these additional contributions, the value of these benefits is not necessarily different from that provided to other similarly situated individuals. Finally, it is impossible for individual employers to determine what share of the employee's coverage during the year was attributable to which employer and what the level of each employee's coverage was. This information is only available from the fund itself. This problem is particularly acute in mobile industries like construction, longshore, building maintenance and entertainment, where it is clear that no one employer is responsible for the coverage that many of the people who work for them receive.

The issue is further complicated by the fact that an employer contributes at the same rate for everyone in the bargaining unit, or everyone in the same job classification. There is no differential in the contributions between people with individual coverage and those with family coverage (and in almost all cases, no explicit employee contribution). An employer would not know whether an employee is receiving coverage as a single person, single + one, or family. All an employer knows is how much it contributed with regard to each person it employed under the plan.

Presumably, employers will be tasked with using COBRA premiums minus the extra two percent, as the cost of health coverage. Although preferable to a full-fledged, section 89-like valuation, the problem of attributing an appropriate proportion of the coverage to each contributing employer would remain. This would create a huge and highly counterproductive burden on the plans, especially in light of the fact that this reporting requirement is solely for informational purposes.² Given the fact that the final employer contributions for a year will not be due until sometime the following January, at the earliest, it is difficult to see how the attribution of an employee's coverage among employers could be completed in time to be reported on the W-2 for the prior year, much less during the year in the case of mid-year terminations (which occur frequently for these highly mobile employees).

Finally, while most of the multiemployer health plans are on a calendar year basis, a significant portion are not, and that will obviously complicate the process of alignment with the calendar-

² Since few multiemployer plans require direct contributions from covered employees, in many cases the plans may not know for sure whether an employee's family is covered until or unless a claim is submitted and eligibility verified. Perhaps every participant in a multiemployer plan would be presumed to have family coverage for this purpose, *see* IRC s. 4980I(b)(3)(B)(ii).

year schedule for W-2s. **For these reasons we strongly encourage you to consider making the current waiver permanent and in doing so provide employers with the option of indicating on the Form W-2 that to the extent the employee received employer sponsored health benefits coverage, such coverage is provided by a multiemployer plan, and indicating on the form the EIN of the plan to which such contributions were made.**

Proposals for Alternatives

Ratable Coverage Based on Contributions. The following proposal is suitable only for W-2 reporting because it is only a rough general representation of the value of the coverage the person received. The IRS website describes the ACA's W-2 reporting as "for informational purposes only" and "to show employees" [an approximation of] "the value of their health care benefits so they can be more informed consumers." We believe that this proposal satisfies the goal.

One such approach would have a multiemployer health plan tell each contributing employer what percentage of total contributions went for health coverage (including administration) for active workers, in the aggregate, as compared with life insurance, disability, retiree health, dental, vision, or whatever other benefits the welfare plan may pay. Then the employer would apply that fraction to the total of health contributions it made on behalf of each covered worker, and include that in the Form W-2. So, for example, if 85% of the contributions, generally, for health coverage and an employer contributed \$600 with respect to a particular employee, it would report having provided that \$510 worth of coverage for that person.

The health coverage "value" reported could be subject to certain reasonableness limits, so that, for instance, the total amount that any one employer would include on a person's W-2 might not exceed the plan's COBRA premiums for family coverage for a year. The Form W-2 could include a reference or box that each employer can check, to report that this was based on information provided by a separate multiemployer health fund. The regulations should authorize employers to rely on the information provided by the plans, so that employers are not legally responsible for errors made by the plan.

While appropriate for such informational purposes this proposal is inappropriate for any other purposes as it will result in some employees having health coverage contributions reported even if the employee did not actually qualify for it, people with single coverage having the value over-reported and people with family coverage having the value under-reporting. The purpose of this reporting requirement is to show employees how much their health coverage costs, perhaps to inspire them to be more prudent in the utilization of health services. The information discussed here, although somewhat imprecise, would certainly give them a reasonable impression. It would also be helpful for all the parties to at least start the process for multiemployer plans at a simplified but manageable level.

Plan Reporting. Another approach is to have the plans do the reporting directly, since they have the data on which participants had coverage and for how long. While the plan could determine whether the individual achieved eligibility, due to the vagaries of plan eligibility whether such coverage is single or family may not be easily ascertained and it may be necessary for plans to presume family coverage in determining the value of the benefit. It may also be necessary for such information to be reported on the Form 1099 rather than W-2. As a cautionary note, however, experience with multiemployer plans' reporting taxable income directly to participants and the IRS, for example in connection with vacation and sick pay benefits, has not been encouraging. At least in the past, the IRS service centers have not been prepared to reconcile information reported as wages but not bearing the same EIN as the employees' "real" W-2s. There has also been unfortunate confusion over payroll tax obligations, but presumably that will be clarified with respect to all W-2 reports of health care value.

Conclusion

We wish to thank you for the opportunity to provide comments on this important issue. We look forward to meeting with you to discuss these alternatives, and will be happy to answer questions or provide additional information that you might find useful.

Respectfully submitted,

Randy G. DeFrehn

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Executive Director