

Notice 2015-16

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*Bakery, Confectionery, Tobacco Workers and
Grain Millers International Union*

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DAVID B. DURKEE
INTERNATIONAL PRESIDENT

May 15, 2015

CC:PA:LPD:PR (Notice 2015-16)
Room 5203
Internal Revenue Service
P.O. Box 7604
Ben Franklin Station
Washington, DC 20044

RE: Notice 2015-16

Submitted by e-mail to Notice.comments@irs.counsel.treasury.gov

Ladies and Gentlemen:

Overview

These comments on Notice 2015-16, issued by the Department of the Treasury and the Internal Revenue Service, are submitted by the Bakery, Confectionery, Tobacco Workers and Grain Millers International Union ("BCTGM"). The BCTGM represents more than 80,000 workers in the food processing, tobacco manufacturing and grain milling industries in the United States and Canada.

Section 4980I of the Code, which was added by the Affordable Care Act, imposes an excise tax equal to 40 percent on the cost of employer-sponsored health coverage provided to an employee or retiree that exceeds certain dollar thresholds referred to as the "excess benefit" in taxable years that begin after December 31, 2017.

Notice 2015-16 was issued by Treasury and IRS to solicit feedback from stakeholders on certain issues pertaining to § 4980I.

The Notice focuses on three broad aspects of the excise tax:

- (1) Which health care coverage counts under the tax;
- (2) How the cost of coverage is determined; and
- (3) How the dollar limits are determined, including application of the law's upward adjustments to the dollar limits.

Concerns Over Implementation of Excise Tax

The BCTGM has been highly critical of the implementation of the 40% excise tax on so-called "Cadillac plans." It is the BCTGM's contention that the excise tax will force employers to erode current health care coverage or pass along health care costs onto employees to avoid paying the 40% tax.

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BCTGM local unions negotiate health care benefits for workers and their families, as well as for retirees. These benefits are provided through a variety of plan types, including single-employer and multiemployer plans, both insured and self-funded.

BCTGM local unions negotiate health care benefits with employers as part of a larger compensation package; monies are split between wages, pension, health care and other forms of compensation or coverage. BCTGM members specifically designate large portions of their total compensation package towards health benefits because they work in dangerous industries, and because they want their families to receive adequate health care coverage.

In these circumstances, BCTGM members take less in wage and/or pension increases to secure comprehensive health benefits. The BCTGM anticipates that when the 40% excise tax is implemented, many employers will seek out cheaper and inferior health care coverage for their employees. In addition, it is highly unlikely that employers will negotiate higher wages and/or pension benefits with local unions, to offset the loss or erosion of comprehensive health benefits.

Conversely, employers that pay the 40% excise tax will begin to factor that tax into employees' total compensation package during negotiations, with the likely effect being the erosion of wage and pension gains and standards.

Proponents of the excise tax have argued that these benefit-rich plans shield workers from the high cost of care and encourage the overuse of care that, in turn, raises overall U.S. health care costs. The BCTGM flatly rejects this theory as it has no basis in fact or the real world actions of BCTGM members. In fact, because hourly production workers must use vacation or unpaid leave to seek medical attention, there is a disincentive to "overuse" health benefits.

In addition, certain health care plans may be more costly and therefore subject to the new excise tax for reasons other than their comprehensive benefits, including plan participants' health status, being employed in an industry with high injury rates, or due to their gender or advanced age.

With all this in mind, the BCTGM International is concerned over two specific issues the Notice seeks to address:

Treasury and IRS ask for input on whether they should provide further guidance on the definition of "employees engaged in a high-risk profession."

Section 4980I states that for an individual "who participates in a plan sponsored by an employer the majority of whose employees covered by the plan are engaged in a high-risk profession or employed to repair or install electrical or telecommunications lines," the applicable annual limit shall be adjusted upward by specified dollar amounts. The term "employees engaged in a high-risk profession" is defined in the statute as including specific categories of individuals and certain employees who are retired from a high-risk profession.

High Risk Professions

To begin with, the BCTGM is concerned that employers in dangerous industries not identified in the categories listed by Treasury and IRS are being unfairly excluded from the upward adjustments.

Manufacturing workers in general, and food processing workers in particular, face numerous hazards on the job that result in long-term injuries and illnesses. Common injuries and illnesses to workers in the food industry include musculoskeletal disorders such as repetitive stress injuries, carpal tunnel syndrome, tendonitis, cumulative trauma injury; strains and sprains to the back/knee/neck; respiratory conditions such as bronchiolitis obliterans and 'bakers asthma'; ear and eye damage; and increased chance of cardiovascular disease. These are conditions that may affect workers throughout their life, which, in turn, increases the use of their health benefits.

In addition, workers in the food and grain milling industries regularly face the dangers of catastrophic injury via electrocution, explosions caused by combustible dust, fatal falls from ladders, platforms or silos, amputation and avulsion injuries from industrial production line machinery, deadly blunt force trauma in augers, under forklifts, pallet jacks, traincars and trucks, asphyxiation in confined spaces and many other life-threatening hazards.

According to data compiled by the Occupational Safety and Health Administration (OSHA) the injury and illness rates in food processing appears to be significant enough to warrant designation as "high risk professions". OSHA records a DART rate (number of nonfatal injuries per 100 workers that result in Days Away, Restriction or job Transfer) for all industries. Most BCTGM workers fall into the food manufacturing classification, with a 3.3 DART rate, which is more than twice the mining industry rate (1.3), more than a full point higher than the construction industry (2.2) and significantly higher than the average across all industries (1.8). BCTGM members who work in chocolate and confectionery manufacturing from cacao beans suffered an incredible 5.6 DART rate in 2013. This is an industry subsector with the sixth-highest rate.

It is clear that by including the upward adjustment, Congress determined that a profession's health-related risks are a major contributing factor to rising health care costs. If that is indeed the case, then all industries with high levels of injuries and illnesses should be eligible for the upward adjustment.

Therefore, it is the BCTGM's recommendation that a methodology be developed to expand the definition of "high risk profession" to include workers in manufacturing industries where high incidence of injuries and illnesses occur, including food processing and grain milling.

As it pertains to multiemployer health plans, the BCTGM recommends that Treasury and IRS permit determination of whether the majority test (as outlined in the Notice) is satisfied and application of the upward adjustment in the annual limitation is to be done on an aggregate basis, across the entire covered population of employees in the plan (or benefit package), not separately for each employer. Therefore, if a majority of all of the employees covered under the plan, irrespective of their employer(s), is individuals engaged in high-risk professions, then the upward adjustment in the annual limitation should apply.

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Age and Gender Adjustments

Section 4980I provides that the applicable annual dollar limitation shall be increased if the cost of providing coverage under a standard benefit package is higher for the employees of an employer than for the national workforce as a whole because of differences in the age and gender characteristics between the two groups.

Many employers in the BCTGM-related sectors have workforces with high seniority rates. Turnover is low at these employers because of the excellent wages and benefits that have been collectively bargained. Due to the stability of the senior workforce, there will likely be greater use of the health benefits package that has been negotiated.

For example, tens of thousands of BCTGM members receive health benefits through the B&C Pension and Health and Welfare Plans. Of those participants 34% have more than fifteen years seniority at their respective employer while 23% have over 20 years of seniority. In addition, of these tens of thousands of participants, 48% are age 50 or older.

Exacerbating the issue of age in this context is the physical nature of work in the food processing industry. These manufacturing workers suffer a physical toll on their bodies due to the strenuous nature of their jobs. Workers who have worked in the industry for twenty years or more are likely to suffer from a variety of ailments including back and neck stresses, respiratory conditions, hip and knee issues, as well as cardiovascular conditions. Obviously these conditions worsen with age and because of this, more senior workers will require more use of their health benefits.

The BCTGM strongly believes these employers (and by extension, the employees) should not be penalized for maintaining an experienced, senior workforce.

At this stage, Treasury and IRS have provided no indication of how they are considering implementing the age and gender adjustment provision. The BCTGM encourages Treasury and IRS to explore the development of specific tools (such as tables or calculators) that simplify the calculation of the adjustment amount, if any.

Sincerely,



David B. Durkee
International President

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