Notice 2015-16

LiUNA!

Submitted by E-Mail to Notice.comments@irscounsel.treas.gov

May 15, 2015

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

Re: Notice 2015-16 (Section 4980I - Excise Tax on "High Cost" Employer-Sponsored Health Coverage)

Comments of the Laborers' International Union of North America (LiUNA)

Greetings:

In Notice 2015-15, the Treasury Department and Internal Revenue Service ("DOT/IRS") invited public comments on issues raised by §4980I of the Internal Revenue Code, as added by the Affordable Care Act (ACA), "to initiate and inform the process of developing regulatory guidance" regarding the 40% excise tax imposed by §4980I on so-called "high cost" employer sponsored plans effective 2018.

On behalf of the 500,000 proud and strong members of the Laborers' International Union of North America (LiUNA), I hereby submit the following comments for the DOT/IRS' consideration.

Description of LiUNA's Interest

Construction Industry

1. LiUNA and employers of LiUNA members throughout the United States sponsor more than 100 multiemployer, joint labor-management health and welfare trust funds (multiemployer plans), most of which have been in existence for generations. Almost all of the trust funds cover laborers employed in the construction industry, including the construction of buildings, streets, roads, highways, bridges, pipelines, sewer and water systems, dams, waterways, tunnels and mines, power plants, airports, rail lines, communication systems and other infrastructure, as well as demolition, site preparation, landscaping, installation, repair, decoration and materials fabrication.

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The health and welfare funds typically provide a wide range of hospital, medical, prescription drug, and other health-related benefits to covered laborers and their families, as well as to retirees and the disabled.

But for these trust funds, laborers and their families would not have had health plan coverage over the past decades, and would have been dependent on government programs. In the construction industry, most employers are small and the projects and workforce are transient, so individual employers have little incentive to maintain an employee health plan for laborers and other trades. By establishing pooled multiemployer health and welfare trust funds through collective bargaining, unions and union employers provided a crucial means of providing benefit coverage to the mobile workforce. Only union employers, who agree through collective bargaining to contribute to the trust funds, provide for their laborers' health plan coverage.

The trust funds are funded by collectively bargained employer contributions (usually a certain dollars-and-cents contribution rate for each hour worked by a laborer covered by the collective bargaining agreement). Although deemed "employer contributions" for legal reasons, the fact is that these collectively bargained contributions are substitute wages. Laborers, collectively through their Union, trade-off wages for employer contributions. So, in a real sense, the funds are pools of workers' money held in trust for the exclusive purpose of providing the promised benefits to eligible laborers and their families. In other words, laborers collectively pay the full cost of their health and welfare fund coverage. Generally, "employee contributions" or "employee premiums" are not charged because, in essence, the collectively bargained employer contributions are employee contributions.

Traditionally, health and welfare funds provide coverage for pre-Medicare retirees. That retiree coverage is often subsidized by the collectively bargained contributions made for active participants so that the retirees do not have to bear the full cost of their benefits.

The vast majority are self-funded; that is, benefits and administrative expenses are paid from the pooled trust rather than from insurance company assets. Insurance policies add significant, unnecessary costs (including insurers' overhead and profit) that divert money from providing benefits.

The funds' labor-management boards of trustees, with professional advice, design the plans of benefits offered by the funds, taking into account the particular facts and circumstances including the benefit needs of the covered laborers, the available funding (collectively bargained employer contributions), and the need to maintain reserves against adverse experience, unexpected costs and economic downturns. If the fund incurs higher benefit costs or administrative expenses than

can be responsibly absorbed by the fund's reserves, or if the contribution income is less than expected, the board of trustees may need to ask the bargaining parties (the Union and the contributing employers) to increase the contribution rate. An increase in the contribution rate may raise the cost of the laborers' pay package to a non-competitive level (costing jobs) or force laborers to give up more wages to compensate for the contribution rate increases.

This process of explicitly trading wages for health plan coverage makes Union negotiators, as well as the laborers they represent, very aware of the costs of health plan coverage and medical services. It also makes them wary of government-mandated benefits that require the health and welfare funds to incur more costs than are affordable under the circumstances.

ACA has substantially increased benefit and administrative costs for health and welfare funds, including other new taxes imposed by the law such as the $63 per covered life tax euphemistically referred to as the transitional reinsurance contribution. That tax alone has cost LiUNA-sponsored health and welfare funds in the United States nearly $40 million for 2014 alone--money taken from the pockets of laborers by the Government to subsidize for-profit insurance companies. The §4980I 40% Excise Tax would eventually cost our health and welfare funds much more. These ACA taxes, along with the benefit mandates and restrictions on long-used cost control mechanisms, are driving many health and welfare funds to unsustainability.

Construction is a highly competitive industry. Projects are typically awarded through a competitive bid process that rewards low costs. Labor cost is a large part of a contractor's (employer's) bid. Labor cost includes any employee health plan obligations. Non-union contractors do not have employee health plan costs because they do not sponsor health plans for their employees. In contrast, union contractors make collectively bargained contributions to health and welfare funds for their employees.

The ACA gives irresponsible non-union contractors a grossly unfair competitive advantage over responsible union contractors. Union contractors' labor costs include collectively bargained contributions to health and welfare funds. ACA enables non-union contractors to continue avoiding any cost for their employees' health care.

Non-union contractors are not required by ACA to maintain an employee health plan or to make any contribution towards their employees' health care (or even pay the $63 per covered life reinsurance tax). Nor will the vast majority of non-union contractors be subject to the "free rider" penalty Section 4980H of the Internal Revenue Code because more than 95% are not "large employers."

Indeed, the Administration takes public pride in the fact that "approximately 96 percent of employers are small businesses and have fewer than 50 workers and are exempt from the employer responsibility provisions."[1] The employees of these non-union contractors will be able to obtain government-subsidized health plan coverage either through a Health Exchange or Medicaid without penalty to their employers.

This situation was worsened when the Administration extended the effective date of ACA's employer responsibility rules from January 1, 2014 to January 1, 2015 and then, for employers of between 50 and 99 full-time employees, until January 1, 2016. In short, ACA, as enacted and as implemented, foolishly punishes the long-responsible union contractors and rewards the long-irresponsible non-union contractors.

These unfair competitive pressures will eventually undermine support for many health and welfare funds by contributing employers and workers as fund costs increase and union contractors are unable to win the competitively bid projects that generate the contributions needed by the funds to survive. Employers will withdraw from health and welfare funds. Funds will be forced by industry economics to terminate so that their members, dependents and retirees may obtain government-subsidized health plan coverage through a Health Exchange, like their non-union competitors. The Exchange health plans will not provide the same level of benefits the members have been receiving through the health and welfare funds. They and their families will suffer a significant decline in health coverage as they move from their health and welfare fund to Exchange coverage.

Some Administration officials may be under the mistaken impression that unions would never agree to the termination of their members' health and welfare funds after many decades of successful operation. The truth is that in many situations the union and its members will have no choice; economics will trump all other considerations. Any thought that the ACA's "free rider" employer responsibility provisions would deter employers from abandoning health and welfare funds is likewise misguided. Most union contractors, like the non-union contractors, are not "large employers" and would not be subject to ACA's "free rider penalties" if they ceased to contribute to health and welfare funds.

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[1] U.S Treasury Fact Sheet regarding the final ACA employer responsibility provision regulations issued on February 10, 2014. See also Treasury Department Press Release, February 10, 2014 ("...about 96 percent of employers are not subject to the employer responsibility provisions....").

Public Sector (State, Local & Federal)

In addition to our members in the construction industry, LiUNA proudly represents tens of thousands of public servants in state and local governments as well as in federal service. These employees and their health plans have also been hard hit by the ACA's costly mandates and taxes. They will be hit even harder by the §4980I Excise Tax, particularly in areas with higher medical costs like the Northeast and California.

Our public sector members, too, have sacrificed wage increases and other compensation over decades to gain good health plan coverage for the protection of their families. They, too, are offended that the ACA punishes them for doing the right thing for all these years. They, too, are outraged that the Excise Tax is forcing a reduction in their families' health benefits and increasing their income and payroll taxes. Health benefit security has been converted into insecurity and instability by the ACA.

Non-Construction Private Sector

LiUNA also counts among its members tens of thousands of private sector workers in many industries other than construction. We sponsor a national multiemployer health and welfare fund for thousands of these workers, but most are covered by local and regional multiemployer health and welfare funds sponsored by LiUNA affiliates or by single employer health plans. All of these members are adversely affected by ACA and will be impacted by the §4980I Excise Tax for the same reasons as described herein.

General Comments

1. The DOT/IRS should advise Congress that the §4980I Excise Tax is not workable and should be repealed. Congress repealed the hopelessly complex health plan rules of Section 89 of the Code before it took effect. It took three years for Congress to realize the mess created by Section 89 and hit the cancel button. The ACA's Excise Tax is similarly flawed and un-administrable, and the time has come to cancel it, too.

Two vehicles for total repeal of the Excise Tax were recently introduced in Congress: the bipartisan H.R. 2050 Middle Class Health Benefits Tax Repeal Act of 2015 and H.R. 879 Ax on the Tax on Middle Class Americans' Health Plan Act. LiUNA strongly supports enactment of these bills as soon as possible before the specter of the Excise Tax does any more damage to LiUNA members and the employment-based health plans, including the multiemployer health and welfare trust funds, on which they and their families depend.

The bipartisan sponsors of H.R. 2050 and H.R. 879 recognize that the Excise Tax irrationally punishes workers and their employers for having health plans, even though the expansion of health plan coverage is supposed to be a core purpose of the ACA. The Excise Tax is finally being seen for what it is: a destroyer of employment-based health plans designed to drive everyone into government-sponsored health programs.

The Administration's promise--that workers will be able to keep their health plan if they like it--apparently means that workers can keep their health plans if they are willing to pay a 40% Excise Tax on their benefits or pay higher income taxes.

2. The Excise Tax was promoted during the ACA's legislative process using false and conflicting justifications whose cracked foundation is being revealed as attention turns to the impact of this tax.

Congressional drafters of the Excise Tax first claimed that it would only apply to the lavish health plans of wealthy executives and Wall Street tycoons. Now it is apparent that the Excise Tax will immediately affect many employment-based health plans covering ordinary workers in 2018. Moreover, eventually all employee health plans, including LiUNA members' health plans, will be impacted by the Excise Tax because medical costs will inevitably escalate faster than the cost thresholds triggering the tax. The working class, not the wealthy, will bear the brunt of the Excise Tax scheme.

Tax-writers in Congress came to realize that the Excise Tax scheme would not bring in the money needed to finance the ACA unless it was extended to health plans covering middle class workers and eventually all employment based plans. They resorted to an alternative, cost-control justification for this extension of the Excise Tax. This purported justification is that the tax gives workers more "skin in the game" and makes them more cost-conscious consumers of medical services.

This academic theory ignores the reality of working Americans, especially LiUNA members and others covered by multiemployer health and welfare funds. As explained above, laborers explicitly trade wages for employer contributions to their health and welfare funds through collective bargaining. In essence, laborers pay the full cost of their health plan coverage. They are well aware that excessive use of medical services can drive up costs and that higher costs mean higher health fund contribution rates that offset wages. They do not need the cynical Excise Tax to give them "skin in the game."

Moreover, the theoretical justification for the Excise Tax wrongly assumes that workers have significant control over medical costs. They do not. Medical costs are driven by many factors beyond the control of consumers including the aging workforce, advances in medical technology, developing drug therapies, shortages of medical professionals, and legal restrictions on cost control methods (*e.g.* bar on importation of lower cost prescription drugs). The complexity of the medical services market is way beyond the understanding of the average American. Just try to figure out a hospital bill.

3. Excise Tax apologists argue that the Excise Tax can be avoided by reducing benefit coverage and increasing cost-sharing by members and dependents. They assume that employers will increase workers' wages to compensate for the higher out-of-pocket costs.

There is no good reason to believe that higher wages will result from higher cost-sharing requirements by a plan. Further, if workers are paid higher wages, those wage increases will be subject to income and payroll taxes unlike employers' contributions to the health plan. In other words, the argument is that workers can avoid the Excise Tax by accepting higher plan cost-sharing and higher income and payroll taxes.

4. The unfairness of the Excise Tax is also shown by the irrational geographical variation in its impact. As demonstrated by a recent Milliman study for the National Education Association[2], health plan premium costs are driven much more by where the covered workers live, and the age and gender mix, than by the generosity of the plan's benefits. The idea that high health plan premiums or contributions equate to overly generous benefits is simply wrong. Some health plans offering modest benefits will be hit hard by the Excise Tax because they cover workers in high cost regions like the Northeast and California. Some health plans offering very generous benefits will be unaffected by the Excise Tax indefinitely because they are in lower cost regions like the rural Midwest.

5. The "ACA cost squeeze" is yet another irrational consequence of the Excise Tax. The ACA's benefit mandates, cost containment restrictions, and administrative requirements are causing health plans to incur substantially higher costs. Moreover, the ACA limits the extent to which a plan can reduce coverage costs through increases in deductibles, co-pays and other cost-sharing by imposing an annual out-of-pocket maximum. In effect, the ACA's rules are helping to drive employment-based health plans towards the cost thresholds that will trigger the Excise Tax.

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2 "What Does The ACA Excise Tax On High-Cost Plans Actually Tax?", Milliman Client Report prepared for the National Education Association, released on April 2, 2015.

6. Given the unpredictability of medical cost inflation from year to year, the trustees of health and welfare funds and employer sponsors of health plans will be faced annually with the task of adjusting benefit packages to avoid the Excise Tax, if possible. This process will cause great insecurity among the covered workers and their families, and will destabilize labor-management relations. Employers will be further discouraged from sponsoring employee health plans. Those that do continue coverage will tend to exaggerate the benefit reductions needed to avoid the tax, all to the detriment of the workers.

7. In short, the DOT/IRS cannot fix by regulation the fundamental flaws in the §4980I Excise Tax. Regulations would only add to the complexity, burdens and disincentives for continuing employment-based health plans. Rather than devoting already strained agency resources to dealing with the Excise Tax, the DOL/IRS should report to Congress that the Excise Tax is unworkable and should be repealed.

Specific Comments

To the extent that the DOT/IRS ventures ahead with efforts to develop rules implementing the §4980I Excise Tax, LiUNA generally concurs with the specific comments being submitted by the AFL-CIO, the National Coordinating Committee for Multiemployer Plans, and various other organizations that share our same response to the Notice. However, there are some aspects of §4980I that require further comment from LiUNA's perspective, specifically the cost threshold adjustment for so-called "high-risk professions".

Code §4980I(b)(3)(C)(iv) provides higher cost thresholds[3] 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 term "engaged in a high-risk profession" is defined in §4980I(f)(3) as including "individuals engaged in the construction, mining, agriculture (not including food processing), forestry, and fishing industries. . ." [Emphasis added.]

We read these provisions to mean that the higher threshold applies to any individual who is covered by a particular employee health plan if the following conditions exist:

(a) **The health plan is "sponsored" by an employer.**

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3 The general threshold amounts for 2018 are increased by $1,650 (self-only) and $3,450 (other than self-only) for such individuals.

In a multiemployer health and welfare fund context, "sponsored" means that the employer is obligated to contribute to the fund for its employees.

(b) **The majority of the employer's employees covered by the health plan are engaged in a "high-risk profession".**

Only one more than 50% of the employer's employees needs to be engaged in the "high-risk profession" for this condition to exist. In other words, this condition exists even if 49% of the employer's employees covered by the plan are not engaged in a "high-risk profession."

Further, an employer's employee may be engaged in a "high-risk profession" even if the employer's primary activity is not in one of the industries defined as "high-risk" (*e.g.* construction industry).[4]

In the case of a multiemployer health and welfare trust fund, the plan administrator should have the option of applying this majority rule on a plan-wide basis or on an employer-by-employer basis. All employers contributing to a multiemployer plan are treated as a single employer for certain purposes under ERISA and the Code. However, there are situations in which employers in various industries participate in the same health and welfare fund. Fairness requires that the plan administrator of any particular fund have discretion to elect plan-wide or employer-by-employer application, and to change that election as circumstances of the fund change.

(c) **Employees engaged in a "high-risk profession" include individuals engaged in the construction industry.**

The ACA does not provide a definition of the "construction industry," but there are several existing descriptions of this wide-ranging industry in common usage. For example, the Census Bureau maintains a North American Industry Classification System that includes a sector 23 (with many sub-sectors) for Construction, the Labor Department's Occupational Safety & Health Administration maintains safety and health standards for construction (*e.g.* Standard Number 1926), and the Bureau of Labor Statistics maintains a Standard Occupational Classification system that includes categories of occupations commonly considered part of the construction industry (*e.g.* 47-0000 Construction and Extraction, 49-0000 Installation, Maintenance and Repair Occupations).

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[4] For example, the Labor Department's Occupational Safety & Health Administration (OSHA) applies construction industry safety and health standards to an employee performing construction work even if the employer is not primarily involved in the construction industry.

These governmental classification systems vary in scope and each serves its own purposes within a certain statutory or regulatory context. None is recognized as definitive or comprehensive for all purposes. And, the scope of the construction industry continues to evolve as new technologies, products and techniques are developed. The government classification systems tend to lag developments on the ground and the common understanding of industry participants. It is commonly understood, for example, that construction employer associations and construction unions are engaged in the construction industry. Often, association and union staff employees participate in the multiemployer health and welfare funds (and pension funds) sponsored by the association's member employers and the union.

For all these reasons, LiUNA submits that the determination of whether an individual plan participant is engaged in the construction industry be entrusted to the good faith discretion of the health plan's administrator.

Conclusion

On behalf of LiUNA's members and leadership throughout the United States, I urge the DOT/IRS to summon the courage to advise Congress that the §4980I Excise Tax is un-administrable and should be immediately repealed. The Excise Tax is the second-coming of Section 89, and it should receive the same treatment as Section 89: repeal.

If, however, the DOT/IRS decides to move ahead with developing regulations to implement the Excise Tax, I urge that the specific comments on implementing the construction industry cost threshold be adopted in the regulations.

Sincerely,

Terry O'Sullivan

TERRY O'SULLIVAN
General President

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