Notice 2015-16

NATIONAL LEAGUE of CITIES

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Submitted via email to Notice.comments@irscounsel.treas.gov (Notice 2015-16)

May 15, 2015

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

Re: Notice 2015-16

Dear Sir/Madam:

On behalf of the members of the National League of Cities (NLC), we respectfully submit these comments on Notice 2015-16 regarding the development of regulatory guidance on the Excise Tax on High Cost Employer-Sponsored Health Coverage (the "excise tax").

BACKGROUND

NLC is the country's largest and oldest national organization serving over 19,000 cities and towns throughout the country and 49 state municipal leagues. Founded in 1924, NLC helps city leaders build better communities through federal advocacy, research, and information sharing between and among cities and towns, state municipal leagues, and the state municipal league intergovernmental risk-sharing pools. It is on behalf of these members that we are submitting comments.

OUR CONCERNS

Our primary concern is that the excise tax will impose an undue financial burden on local government employers. While the excise tax is not effective until 2018, it is already having an immediate impact on collective bargaining and budget planning of state and local governments, with the greatest impact on union contracts for fire, police and school districts. In addition, local governments in many states have statutory requirements mandating continuation of benefit coverage for certain former employees, such as early and post 65 retirees and/or police, fire, first responders, and EMS employees. These legal requirements make it difficult for local government employers to make benefit changes that would allow them to avoid the tax.

NLC supports efforts and comments to reduce the impact of the excise tax on local governments and to minimize the administrative burden on employers in calculating the tax.

COMMENTS

There are a number of key areas where the excise tax is likely to have a significant impact on municipal employers – primarily in regards to retirees, treatment of Health FSAs and HRAs, and in the adjustment for high-risk professions. In addition to supporting comments submitted by the Association of Governmental Risk Pools (AGRiP), these comments focus specifically on these key areas.

Retirees

Many states mandate continuation of benefits for public sector retirees who meet certain age and service requirements. For example, some states require that employees eligible for a public pension be allowed to continue on the active employee group health plan indefinitely. These legal requirements result in a higher active employee premium than if the two groups were rated separately. As a result, the active employee premium is more susceptible to being subject to the excise tax. We encourage the Department to issue guidance allowing municipal employers to consider both early retirees and post 65 retirees, regardless of eligibility for and/or enrollment in Medicare, to be a "qualified retiree", thereby allowing the municipal employer to utilize the higher applicable dollar limit. As stated, these retiree benefits are very costly for public employers and cannot be unilaterally modified in most situations.

The Department has also asked whether additional guidance would be beneficial under Code Section 4980I(d)(2)(A), which provides that "the plan may elect to treat a retired employee who has not attained the age of 65 and a retired employee who has attained the age of 65 as similarly situated beneficiaries." As noted, many states mandate benefit continuation for early and post 65 retirees. This is a significant issue and concern for many local governments and we encourage the Department to allow a plan to average the cost of employer-sponsored coverage for pre-Medicare retirees with the cost of similar coverage for retirees who are entitled to benefits under Medicare (where such employer-sponsored coverage may be limited to a Medicare supplement plan).

Allowing employers to offset the typical high costs of pre-Medicare retiree coverage with lower cost Medicare supplement plans increases the likelihood that employers will preserve pre-Medicare retiree coverage (which was the main goal of the ACA's Early Retiree Reinsurance Program) and provides relief to public employers who are legally required to offer retiree health coverage under constitutional and statutory mandates or as required by collective bargaining agreements. Interpreting this language in a contrary manner is likely to wreak further havoc on the financially vulnerable budgets of state and local governments.

Treatment of Health FSAs and HRAs

Health FSAs
We encourage the Department to exclude from applicable coverage contributions to or reimbursements from limited-purpose Health FSAs. Limited purpose Health FSAs only allow for reimbursement of eligible dental and vision expenses that are not covered under a dental or vision plan. Dental and vision plans are often excepted benefits, which means they are not subject to many other provisions of the Affordable Care Act. Excluding limited-purpose Health FSAs from the cost of applicable coverage would provide consistency with a similar exclusion for limited-purpose HRAs and the exclusion of limited scope dental and vision plans from the Affordable Care Act.

HRAs
We also encourage the Department to issue guidance permitting employers to determine the cost of coverage for HRAs by using either the contribution approach (based on the amounts made newly available to a participant each year) or the claims approach (adding together all claims, but not administrative expenses, attributable to the HRA for a particular period). This will provide employers with the greatest flexibility to determine the least complicated and least administratively burdensome approach for their plan. Requiring one or the other method for determining the cost of coverage for HRAs may also have the unintended consequence of greater cost variability from year to year.

We also encourage the Department to permit the employer to exclude from the cost of applicable coverage contributions to and/or reimbursements from limited-purpose HRAs, which are used to reimburse for excepted benefits such as dental and vision and/or for employee contributions towards coverage.

Comments are also requested on whether the potential approaches described for purposes of determining the cost of applicable HRA coverage under § 49801 should apply for purposes of determining the COBRA applicable HRA premium. We recommend that when a monthly HRA contribution amount is determined for a 12-month determination period, and is determined before the beginning of such period, the actual monthly HRA contribution amount should be the amount used for purposes of determining the COBRA applicable premium.

Adjustments for High-Risk Professions

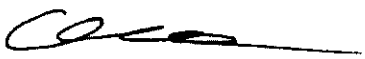
We support the issuance of further guidance on what constitutes an "employee engaged in a high-risk profession." We suggest that the Department specify in that guidance that public works employees and municipal utility workers qualify as individuals in the "construction" trade

because they utilize heavy machinery, work in dangerous environments (e.g., roadways, elevated heights, and confined spaces that contain toxic gases and other hazardous materials), work during inclement weather (e.g., snow storms and hurricanes), and are sometimes required to work with electrical current.

In determining whether the majority of employees covered by a plan are engaged in a high-risk profession, we suggest that the Department allow employers to have multiple "plans" as long as each plan can be justified using bona fide business criteria. For example, an employer should be allowed to have different plans for specified job categories, hourly and salaried employees, geographic locations, union personnel, and similar bona fide business criteria.

Thank you for considering our comments. If you have any questions or would like to discuss these comments further, please feel free to contact Carolyn Coleman, NLC's Director of Federal Advocacy, at 202.626.3023 or by email at coleman@nlc.org.

Sincerely,



Clarence E. Anthony
Executive Director/CEO
National League of Cities