

MAY 19 2015



USWTM

May 15, 2015

CC:PA:LPD:PR
Room 5203, Internal Revenue Service
P.O. Box 7604
Ben Franklin Station
Washington, D.C. 20044

To Whom It May Concern:

These comments are submitted on behalf of the members of the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (USW). Our union is the largest industrial union in North America. We represent 1.2 million active and retired workers in the US and Canada. Our members work in many sectors of the economy including manufacturing, metals, mining, paper, rubber, shipbuilding, oil refining, chemicals, transportation, healthcare, government, education, and the service sector.

Our members negotiate with their employers for health care benefits as a part of their collective bargaining agreements. The vast majority of USW members have employer-sponsored health insurance coverage. Many have foregone wage increase to protect their access to employer-sponsored health coverage.

Overall, this tax is the most common issue that comes up at bargaining tables for our members, who are currently negotiating contracts that extend into 2018 when the tax comes into effect. Without guidance or regulations in place, employers and unions are left to guess whether their current health plan will trigger the tax in 2018 or subsequent years. In many cases, our members' employers are attempting to switch to qualified high deductible health plans to avoid the tax altogether.

United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union
Legislative Department, 1155 Connecticut Ave., Suite 500, N.W., Washington, D.C. 20036 • 202-778-4384 • 202-419-1486
(Fax)

www.usw.org

10.6.2

In addition to the effect on our current membership, these comments address issues of concern to the Voluntary Employees' Beneficiary Associations (VEBAs) that are associated with the USW. The USW is associated with 22 VEBAs that provide health care benefits to retired USW members who formerly worked for various companies in the steel, tire, auto parts, mining and aluminum industries, along with their spouses, dependents and surviving spouses. These VEBAs cover over 95,000 individuals. About 80% of these persons are enrolled in Medicare.

In most cases, these VEBAs were established and are maintained in accordance with the terms of class action or bankruptcy settlement agreements that were approved by federal district and/or bankruptcy courts. The VEBAs were usually given a fixed pool of assets from the former employers of the retirees in order to pay for the retirees' health care coverage. Thus, the ability of the VEBAs to continue providing affordable health coverage to the retirees will be directly compromised by any taxes or administrative expenses that reduce their fixed pool of assets.

Overview

We appreciate the opportunity to comment to the Department of the Treasury ("Treasury") and the Internal Revenue Service ("IRS"). Notice 2015-16 requested comments on potential approaches related to (1) the definition of applicable coverage; (2) the determination of the cost of applicable coverage; and (3) the application of the annual statutory dollar limit to the cost of applicable coverage. We address each of these sections individually. These comments also address the importance of flexibility in applying the provisions in § 4980I.

Definition of Applicable Coverage

In this section, the notice called for comments about the types of coverage both excluded and included in "applicable coverage" that are not explicitly outlined in § 4980I(d)(1). As detailed below, USW seeks to confirm and recommend the following regarding the definition of applicable coverage:

1. Exclude salary deferral contributions to HSAs
2. Exclude on-site medical clinics
3. Exclude all limited scope dental and vision coverage, regardless of whether it is insured or self-insured.

Health Savings Accounts (HSAs)

The notice proposes that all employer contributions to HSAs, including worker salary deferrals contributions, be treated as applicable coverage while excluding worker after-tax contributions. This proposal is too expansive.

A HSA is not necessarily a group health plan, even if an employer makes contributions. In fact, Treasury, the Department of Labor, and the Department of Health and Human Services have said that HSAs are generally not treated as group health plans because the value is available for medical and nonmedical expenses. In some circumstances, HSAs are treated as employee welfare benefit plans by the Department of Labor. For these reasons, HSAs should not be considered group health plans.

The statute does not support the conclusion that employer and pre-tax contributions to HSAs should be included as applicable coverage. The statutory directive is that "applicable coverage" is limited to group health plans. As outlined above, HSAs are not a group health plan and therefore do not fall under the statutory definition of what is to be included as applicable coverage.

There is ambiguity as to whether employer contributions should include salary deferral contributions that workers make to the HSA, whether it is a group health plan or not. USW urges the exclusion of these salary reduction contributions made by workers. These types of contributions are generally recognized as employee, not employer, contributions by the Department of Labor. Should these contributions be recognized, workers could obtain the tax benefit by simply making the contribution post-tax because post-tax contributions by workers are excluded from "applicable coverage." However, workers who choose to contribute to an HSA should not be required to take on the administrative burden to obtain tax benefits that they previously received. Salary reduction contributions to HSAs should not be considered in determining the cost of applicable coverage.

On-site Medical Clinics

On-site medical clinics are common in industrial workplaces where many USW members work. The primary purpose of these clinics is to have a healthcare professional, often a nurse, on duty in order to administer first aid in the event of a workplace injury. Most workers do not consider the use of this clinic as part of their employer-sponsored health coverage.

The USW agrees with the direction of the notice to exclude on-site medical clinics that offer only de minimus care to employees from applicable coverage. We agree that, consistent with the COBRA regulations, these clinics primarily provide first aid and employees are not charged for the use of the clinic.

Limited Scope Dental and Vision Benefits

The USW strongly urges Treasury and IRS to exclude all limited scope dental and vision benefits from the cost of applicable coverage, regardless of whether the coverage is insured or self-insured. As indicated in the notice, whether coverage is

insured or self-insured is generally not relevant for purposes of § 4980I, including identifying whether any particular coverage is applicable coverage. The USW holds a view consistent with the Notice that the contractual structure and funding methodology does not change the basic reason for excluding these benefits as not medical or drug coverage.

Furthermore, Treasury and the IRS, along with the Department of Labor and the Department of Health and Human Services have already adopted this approach in the recent amendment to the excepted benefits regulations under § 9831 in order “to achieve greater consistency between insured and self-insured coverage.” The USW believes both of these are cogent arguments that fully support the exclusion of all limited scope dental and vision benefits from the cost of applicable coverage.

Determination of Cost of Applicable Coverage

This section calls for comments about the rules to determine the cost of applicable coverage. Overall, USW does not see the need for the rules for determining the cost of applicable coverage to be identical to those to calculate COBRA premiums because the statute only requires that they be “similar” due to their very unique purposes and applications. In this section, USW wants to confirm and recommend the following:

1. Mandatory aggregation of similar benefit packages and disaggregation of self-only and other-than-self-only coverage.
2. Confirm that plans may combine all pre and post-65 retirees.
3. Establish rules acknowledging different uses and circumstances for Health Reimbursement Arrangements (HRAs)
4. Exclude all fees, surcharges, and taxes imposed by the Affordable Care Act and any State or local healthcare laws from the cost of coverage.

Mandatory Aggregation of Similar Benefit Packages and Mandatory Disaggregation of Self-Only and Other-Than-Self-Only Coverage

USW supports the requirement that employers group employees according to the benefit package. Employers should be permitted to group employees in similar but not identical benefit packages. Allowing for this type of aggregation could reduce some of the inequities from variations in the cost of coverage based on geographic pricing differences and from differences in the demographics of the covered population for each similar but not identical health benefit package. We suggest that a reasonable, good faith interpretation of what constitutes the same or substantially similar benefit package could be employed. Those determining the cost of applicable coverage could assist in determining the most appropriate grouping based on the circumstances.

Relating to mandatory disaggregation of self-only coverage and other-than-self-only coverage, USW suggests that Treasury and the IRS provide explicit guidance clarifying that this disaggregation is not required for coverage provided by a multiemployer plan. Additionally, USW recommends that employers are not required to further disaggregate employees enrolled in other-than-self-only coverage into sub-groups based on the number of individuals receiving coverage in addition to the employee. This recommendation is consistent with the proposal in the notice.

Combining Pre & Post-65 Retirees

As the Notice recognizes, Section 4980I(d)(2)(A) states that a 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." The report issued by the Joint Committee on Taxation on this section confirms that "in determining the coverage value for retirees, employers may elect to treat pre-65 retirees together with post-65 retirees."

Thus, the USW requests that Treasury and IRS include language in the proposed regulation that explicitly confirms that plans may combine pre and post-65 retirees for purposes of calculating the cost of their applicable coverage. The regulations should make clear that this specific rule overrides the general proposition that employees should be separated if they have different benefit options, and instead allows pre and post-65 retirees to be aggregated despite the differences in their benefits.

Furthermore, the USW urges Treasury and IRS to indicate in the proposed regulations that plans which elect to combine pre and post-65 retirees may aggregate all of these retirees, regardless of whether they are enrolled in an HMO, PPO or a Medicare Advantage plan. It would be contradictory to require disaggregation of retirees based on these less significant differences in benefit options, when the statute specifically allows for aggregation of pre and post-65 retirees, notwithstanding the very significant differences in their benefits.

Establish Rules Acknowledging Different Uses and Circumstances for Health Reimbursement Arrangements (HRAs)

HRAs are used in a variety of ways. They can be integrated with other coverage or stand alone. Contributions can be notional or actual dollars contributed and invested. For some, contributions are credited during an employee's working years and contributions are made at the time of retirement.

Due to the wide variety of HRAs, USW urges that Treasury and the IRS consider the variety of circumstances and ensure that any rules about HRAs are workable for all of the possible arrangements. The development of rules should be guided by the following principles:

A). Any amounts contributed or credited to an HRA before 2018, as well as any related investment earnings should be disregarded.

B). Any amounts that may be used only during retirement, even if contributed or credited during a worker's career, should be disregarded in determining the cost of coverage while the worker is employed.

C). Any amounts used to reimburse expenses for excepted benefits should be disregarded; and

D). Any amounts used to fund the worker's contribution for coverage, including retiree coverage, should be disregarded.

E). Any amounts attributable to investment earnings or credits should be disregarded unless and until they are used to reimburse worker and retiree expenses.

We suggest that plan sponsors be able to select any of the available methods, including the "amounts newly available" approach, to determine the cost of coverage. This will allow plans to avoid issues like the potential for overvaluing under the "amounts newly available" approach if the amounts are not fully used during the year they become available.

IF HRAs are available for multiple purposes, such as the worker or retiree contribution to the cost of coverage, excepted benefits or other benefits, the cost of the HRA should be allocated among those different uses. Treasury and the IRS should develop rules that acknowledge and distinguish among these various uses to avoid placing an additional cost on workers and retirees.

Treatment of Taxes and Fees

The USW urges Treasury and IRS to exclude from the cost of coverage all taxes, surcharges, assessments, and fees imposed on plans by the Patient Protection and Affordable Care Act or by State or local laws that tax the provision of health coverage. This exclusion should not be limited just to the excise tax on high cost plans. The exclusion should extend to all taxes and fees, including the taxes for the Patient-Centered Outcomes Research Trust Fund and the Health Insurance Providers fee. Whatever the policy rationales for the taxes and fees, they do not reflect the cost of actually providing health coverage. Also, plan sponsors do not have any control over the taxes and fees. Thus, there is no justification for including these taxes and fees in the cost of coverage.

Applicable Dollar Limit

Overall, USW comments on the applicable dollar limit relate to the adjustments included in § 4980I to increase the dollar amounts. Specifically, our comments are to confirm and suggest the following:

1. Confirm that plans may apply the increased threshold for qualified retirees even though they are combining pre and post-65 retirees.
2. Apply flexibility in the determination of those occupations that fall within the high risk profession category.
3. Explore development of a tool to simplify the age and gender adjustment amount calculation.

Increased Threshold for Early Retirees

The Notice also recognizes that Section 4980I(b)(3)(C)(iv) provides an increase in the dollar limits for "qualified retirees" who have attained age 55 and are not entitled to benefits or eligible for enrollment under Medicare. The USW urges Treasury and IRS to include language in the proposed regulations confirming that these increased thresholds apply to qualified retirees in situations where a plan has elected to combine pre and post-65 retirees for purposes of calculating the cost of applicable coverage. Nothing in the statute or committee report suggests that qualified retirees should lose the benefit of the increased thresholds just because their plan has elected to combine them with post-65 retirees. To the contrary, footnote 8 in the Notice implies that the higher thresholds should still apply in this situation.

The USW also urges Treasury and IRS to apply the increased threshold to the surviving spouses of qualified retirees. That is, if a surviving spouse is at least age 55 and not eligible for Medicare, he or she would be treated the same as a qualified retiree.

Adjustments for High-Risk Professions

Section 4980I provides for an adjustment for plans in which the majority of employees are engaged in a "high risk profession" or who are retired from a "high risk profession." The statute is somewhat restrictive in it specifies certain high risk professions; however, we urge Treasury and the IRS allow for maximum flexibility in determining what qualifies as a high-risk profession.

Those professions that are named in the statute are, in most cases, acutely hazardous. However, many USW members work in jobs and industries that are highly hazardous but did not make the list of "high risk professions" included in the statute. Our union records, on average, about one workplace fatality of a USW member every ten to twelve days. Those mostly occur in manufacturing workplaces. In addition, studies have shown that manufacturing workers suffer high rates of heart disease and other illnesses

caused by exposures at work that do not always get captured through the workers compensation system. We urge Treasury and the IRS to employ flexibility to include other high-risk occupations.

Regarding the definition of "individuals who provide out-of-hospital emergency medical care (including emergency medical technicians, paramedics, and first responders)," we again advocate for an inclusive definition. USW represents emergency medical technicians, paramedics, ambulance drivers, and others whose job responsibilities require that they be able to provide emergency medical care. There is not a federal definition for "first responder." This broad category should include any individual who has been trained to provide emergency medical care or basic life support as part of his/her job responsibilities or in the event of a disaster or emergency situation.

USW also represents workers who are miners and who do heavy highway construction. Therefore, we recommend that Treasury and the IRS allow either of two approaches in determining who qualifies as "individuals engaged in the construction, mining, agriculture (not including food processing), forestry, and fishing industries": (1) Treat any individual employed in an occupation that falls within well-known occupation groups that align with these categories, such as those established by BLS under the Standard Occupational Classification system, as being engaged in the enumerated industry; or (2) Treat any individual employed by an employer the primary activity of which falls within one of the enumerated industries, following commonly used industry codes such as those under the North American Industry Classification System (NAICS). Those responsible for calculating the excess amount should be able to choose between those two approaches to make their determination.

Explore development of a Tool for Age and Gender Adjustments

As mentioned earlier in these comments, § 4980I is a constant issue at the bargaining table, and Treasury has not given the public any indication about the way an age and gender adjustment may be calculated, how "the national workforce" is defined for purposes of the calculation. USW recommends that Treasury and the IRS should explore developing tools to assist administrators in determining if an adjustment is permitted, rather than leaving each plan to the costly and time consuming process of making that determination on their own.

Flexibility in Applying Excise Tax Provisions

The USW urges Treasury and IRS to give plan sponsors maximum flexibility in applying various provisions related to the excise tax on high cost plans. This is justified because of the considerable diversity in plan characteristics. It also will help to reduce administrative burdens and costs for plan sponsors. This is especially important for the USW, because the VEBAs with which it is associated have a limited amount of

resources to accomplish their mission of providing affordable health coverage to retirees and their dependents.

The USW believes it is especially important to allow flexibility in the following areas:

A). In disaggregating employees or retirees based on whether they have self-only coverage or other than self-only coverage, plans should not be required to separate employees enrolled in other than self-only coverage based on the number of persons actually receiving such coverage. Instead, they should be able to include everyone receiving coverage for more individuals than just themselves. The USW also urges Treasury and IRS to clarify how plans should address mid-year and retroactive changes to that status.

B). The actuarial basis method for determining the cost of applicable coverage in a self-insured plan should simply use a broad standard that requires "reasonable actuarial principles and practices," rather than specifying a list of factors. While the person making the actuarial estimate should have to be accredited by the Society of Actuaries or the American Academy of Actuaries, the USW believes the standards of the actuarial profession are sufficient to guard against abuses. Requiring compliance with a list of factors would increase administrative burdens and costs unnecessarily.

C). In using the past cost method to determine the cost of applicable coverage, self-insured plans should be given considerable flexibility in choosing the 12 month measurement period. The USW believes the approach suggested in the Notice would provide such flexibility.

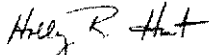
D). In using the past cost method, plans should be given flexibility to include either claims paid or claims incurred (not claims incurred or submitted as suggested in the Notice). This flexibility is important to reflect the diversity of record keeping practices in different plans, and to reduce administrative burdens for plan sponsors.

E). Plans should have the flexibility to change their approach for determining the cost of coverage in situations where there has been a change in the plan design. For example, due to changes in the plan design, the past cost method might no longer be relevant in determining the cost of coverage. Plans should have the flexibility to reflect the most relevant approach in updating their cost of coverage. Otherwise, it would be unfair to lock a plan into continuing to have to use a pre-selected approach.

Conclusion

The United Steelworkers (USW) appreciate the opportunity to comment as Treasury and the IRS move forward on guidance and regulations related to § 4980I. Please do not hesitate to contact us if you have questions about these comments.

Sincerely,



Holly R. Hart
Assistant to the President
Legislative Director

HRH/af