

## Request for Comments on Health Coverage Affordability Safe Harbor for Employers (Section 4980H)

Notice 2011-73

### I. PURPOSE AND BACKGROUND

This request for comments is intended to continue the process of developing regulatory guidance on the shared employer responsibility provisions of § 4980H of the Internal Revenue Code (Code). The process was initiated with the release of Notice 2011-36 (2011-21 I.R.B. 792), which described potential approaches to interpreting and applying certain provisions of § 4980H and invited comments on those approaches. Section 4980H was added to the Code by § 1513 of the Patient Protection and Affordable Care Act (Affordable Care Act) enacted March 23, 2010, Pub. L. No. 111-148, and amended by § 1003 of the Health Care and Education Reconciliation Act of 2010, enacted March 30, 2010, Pub. L. No. 111-152. Section 4980H is effective for months beginning after December 31, 2013.

Generally, § 4980H provides that an applicable large employer (as defined in § 4980H(c)(2)) is subject to an assessable payment if any full-time employee is certified to receive an applicable premium tax credit or cost-sharing reduction and either (1) the employer does not offer to its full-time employees (and their dependents) the opportunity to enroll in minimum essential coverage under an eligible employer-sponsored plan (§ 4980H(a))<sup>1</sup>; or (2) the employer offers its full-time employees (and their dependents) the opportunity to enroll in minimum essential coverage that either is

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<sup>1</sup> Minimum essential coverage is defined in § 5000A(f) of the Code. The definition of “eligible employer-sponsored plan” in § 5000A(f)(2) applies for purposes of § 4980H.

unaffordable within the meaning of § 36(B)(c)(2)(C)(i) or does not provide minimum value within the meaning of § 36(B)(c)(2)(C)(ii) (§ 4980H(b)).

Notice 2011-36 requested comments on several discrete issues under § 4980H and specifically on the issue of who is a full-time employee, including a potential “look-back/stability period safe harbor” method for determining full-time status. This notice requests comments on a proposed safe harbor, which could be incorporated in future proposed regulations, for determining the affordability of coverage under an eligible employer sponsored plan for purposes of an employer’s potential assessable payment under § 4980H(b). The Department of the Treasury (Treasury) and the Internal Revenue Service (IRS) intend to publish proposed regulations on the issues addressed in Notice 2011-36, on the proposed employer safe harbor outlined in this notice and on a broader set of issues under § 4980H.

## II. PROPOSED AFFORDABILITY SAFE HARBOR FOR EMPLOYERS

Whether an applicable large employer’s health coverage is affordable to its full-time employees is essential in determining whether an employee can receive a premium tax credit and, in turn, whether the employer is subject to an assessable payment under § 4980H(b). Coverage under an employer-sponsored plan is affordable to a particular employee if the employee’s required contribution (within the meaning of § 5000A(e)(1)(B)) to the plan does not exceed 9.5 percent of the employee’s household income for the taxable year.<sup>2</sup> Section 36B(c)(2)(C)(i). Household income for this purpose is defined as the modified adjusted gross income of the employee and any members of the employee’s family (which would include any spouse and dependents)

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<sup>2</sup> The 9.5 percent may be adjusted after 2014 to reflect rates of premium growth relative to growth in income and after 2018 to reflect rates of premium growth relative to growth in the consumer price index. See Prop. Treas. Reg. §§ 1.36B-0 through 1.36B-5.

who are required to file an income tax return. Section 36B(d)(2)(A). Modified adjusted gross income means adjusted gross income (within the meaning of § 62) increased by amounts excluded from gross income under § 911 and by the amount of any tax-exempt interest a taxpayer receives or accrues during the taxable year. Section 36B(d)(2)(B).

Because affordability is determined by reference to household income and because household income is determined by reference to variables that are generally unknown to an employer (i.e., the modified adjusted gross income of the employee and the employee's spouse and dependents), employers may encounter practical difficulties in assessing whether the coverage they are offering is affordable to certain employees. To address this concern and provide employers a more workable option for determining the affordability of their health coverage, Treasury and the IRS expect to propose an affordability safe harbor whereby, for purposes of § 4980H(b), affordability of an employer's coverage would be measured by reference to an employee's wages from that employer. Wages for this purpose would be the total amount of wages as defined in § 3401(a), which is the amount required to be reported in Box 1 of Form W-2, Wage and Tax Statement (W-2 wages).

It is contemplated that under this proposed safe harbor, an employer would need to meet certain requirements, including: (1) that the employer must offer its full-time employees (and their dependents) the opportunity to enroll in minimum essential coverage under an eligible employer-sponsored plan, and (2) that the employee portion of the self-only premium for the employer's lowest cost coverage that provides minimum value (the employee contribution) must not exceed 9.5 percent of the employee's W-2

wages. If the employer satisfies both of these requirements for a particular employee (as well as any other conditions for the safe harbor), the employer would not be subject to an assessable payment under § 4980H(b) with respect to that particular employee, even if that employee receives a premium tax credit or cost sharing reduction.

Application of this safe harbor would be determined after the end of the calendar year and on an employee-by-employee basis, taking into account the W-2 wages and the employee contribution. So, for example, the employer would determine whether it met the proposed affordability safe harbor for 2014 for an employee by looking at that employee's W-2 wages for 2014 and comparing 9.5 percent of that amount to the employee's 2014 employee contribution.

Although the determination of whether an employer actually satisfied the safe harbor would be made after the end of the calendar year, an employer could also use the safe harbor prospectively, at the beginning of the year, by structuring its plan and operations to set the employee contribution at a level so that the employee contribution for each employee would not exceed 9.5 percent of that employee's W-2 wages for that year. It is contemplated that employers, on a consistent basis, would be permitted to make reasonable and necessary adjustments for pay periods so that the employee contribution does not exceed 9.5 percent of the employee's W-2 wages.

By allowing employers to base their affordability calculations on each employee's W-2 wages (which employers know) instead of each employee's household income (which employers generally would not know), the safe harbor could provide a more workable and practical method for measuring the affordability of an employer's coverage for § 4980H(b) purposes. In most instances, if employer-sponsored coverage

were affordable based on the employee's W-2 wages, it would also be affordable based on the employee's household income because an employee's household income is likely to be greater than the employee's W-2 wages. In that case, a premium tax credit would not be available to that employee and, in turn, the employer would not be subject to an assessable payment under § 4980H(b) with respect to that employee. In some circumstances, an employee's household income may be less than the employee's W-2 wages (for example, because of adjustments to gross income for alimony paid or losses due to self-employment). The proposed safe harbor would address those situations by allowing the employer to rely on an employee's W-2 wages for analyzing the affordability of the employer's health coverage with respect to that employee.

This proposed affordability safe harbor would apply only for purposes of determining whether an employer's coverage satisfies the 9.5 percent affordability test for purposes of the assessable payment under § 4980H(b). For example, the safe harbor would not affect an employee's eligibility for a premium tax credit under § 36B. An employee's eligibility for the premium tax credit would continue to be based on the affordability of employer-sponsored coverage relative to an employee's household income. Accordingly, in some instances, the effect of the safe harbor could be to treat an employer's offer of coverage to an employee as affordable (based on W-2 wages) for purposes of determining whether the employer is subject to an assessable payment under § 4980H(b), while that same offer of coverage could be treated as unaffordable (based on household income) for purposes of determining whether the employee is eligible for a premium tax credit under § 36B.

### III. REQUEST FOR COMMENTS

As noted, Treasury and the IRS intend to issue guidance, including proposed regulations, on the employer shared responsibility provisions under § 4980H. To help inform that guidance, comments are invited on the affordability safe harbor for employers for purposes of § 4980H(b). In particular, comments are invited on the following issues:

- Whether or how wages and employee contribution amounts would need to be determined for employees who are employed by an employer for less than a full year, employees who move between full-time and part-time status, situations in which the plan year is not a calendar year, and other similar special circumstances.
- Whether there are other possible safe harbor methods for determining the affordability of coverage under an employer-sponsored plan for purposes of calculating an employer's potential assessable payment under § 4980H(b).
- How to coordinate any affordability safe harbor with the full-time employee look-back/stability safe harbor described in Notice 2011-36.

Comments must be submitted by December 13, 2011. Comments should include a reference to Notice 2011-73. Send submissions to CC:PA:LPD:PR (Notice 2011-73), Room 5203, Internal Revenue Service, P.O. Box 7604, Ben Franklin Station, Washington, DC 20044. Submissions may be hand delivered **Monday through Friday** between the hours of 8 a.m. and 4 p.m. to CC:PA:LPD:PR (Notice 2011-73), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue, NW, Washington, DC

20044, or sent electronically, via the following e-mail address:

*Notice.comments@irscounsel.treas.gov*. Please include "Notice 2011-73" in the subject line of any electronic communication. All material submitted will be available for public inspection and copying.

#### NO INFERENCE

No inference should be drawn from any provision of this notice concerning any other provision of § 4980H or any other section of the Affordable Care Act.

#### DRAFTING INFORMATION

The principal author of this notice is Mireille Khoury of the Office of Division Counsel/Associate Chief Counsel (Tax Exempt and Government Entities). For further information regarding this notice contact Mireille Khoury at (202) 622-6080 (not a toll-free call).