



November 4, 2021

The Honorable Chuck Schumer
Majority Leader
U.S. Senate
S-221 The Capitol
Washington, DC 20510

The Honorable Nancy Pelosi
Speaker
U.S. House of Representatives
H-232 The Capitol
Washington, DC 20515

The Honorable Mitch McConnell
Minority Leader
U.S. Senate
S-230 The Capitol
Washington, DC 20510

The Honorable Kevin McCarthy
Minority Leader
U.S. House of Representatives
H-204 The Capitol
Washington, DC 20515

Dear Congressional Leaders:

The Partnership for Employer-Sponsored Coverage (P4ESC) writes to share our strong concerns with several elements of H.R. 5376, the Build Back Better Act (otherwise known as the reconciliation bill). More specifically, we write in opposition to: civil monetary penalties for mental health parity violations; the proposed incursion into the Affordable Care Act (ACA) “firewall” that keeps employer plans intact; and other provisions that remove indexing for the ACA affordability test. Common to each of these concerns is the need to protect employer-sponsored health plans, the private foundation of our health care system.

Employers work tirelessly to provide quality mental health and substance use disorder coverage for our employees and their families. Employers have innovated and invested in significant new programs during the COVID pandemic. Addressing the current mental health care crisis will require significant efforts in partnership between employers, providers, government, patient groups and other stakeholders. We believe that punitive legislative provisions like civil monetary penalties will poison these efforts and serve only to hurt patients.

Employers and mental health care providers worked together to build the compromise that became the Mental Health Parity and Addiction Equity Act of 2008. Employers and providers worked closely with the late former Senators Edward Kennedy (D-MA) and Pete Domenici (R-NM) to build compromise language that balanced financial parity in coverage with the retained ability to medically manage that coverage. It is this latter element – particularly as regards noneconomic factors, such as network adequacy, formulary design, and step therapy – that is at issue now.

Civil monetary penalty enforcement could be used as a tool to impose network adequacy requirements by penalizing employers based on the raw number of mental health or substance

use disorder providers in network. Yet, employer networks consistently report that these providers refuse to bargain in good faith and decline to participate in our networks at reasonable rates. Provider shortages – inside- as well as outside-networks – are rampant. According to HHS, 129.6 million Americans live in areas designated as Mental Health Professional Shortage Areas.^[1] There are 6,559 additional BH providers^[2] needed to fill these provider gaps.^[3] Provider shortages, in conjunction with limited in-network providers, make it difficult for patients to find affordable in-network providers.

Imposing penalties on plan sponsors cannot solve provider shortages. The federal government should not put its thumb on the scale in private negotiations between providers and employers. In keeping with the spirit of the mental health parity law, employers should be treated on par with providers.

As regard to the proposed ACA Premium Tax Credit (PTC) expansion, we are strongly concerned by the erosion of the “firewall” between employer-sponsored plans and exchange coverage. Allowing the PTC in situations where an applicable employer has offered minimum essential coverage meeting the otherwise applicable affordability requirements of the ACA will threaten the integrity of the employers’ group plans.

Employers do not disagree with Congress’s important goal of closing the “coverage gap”. But, CBO’s estimate that 2.8 million fewer individuals will be enrolled in employer-sponsored coverage is greatly troubling. This disruption could affect the ability of employers to continue to offer low-cost and high-quality health care plans to employees.

This provision appears to be the first incursion into employer plan risk pools (the firewall) since passage of the ACA in 2010. The proposed change to the firewall here may disrupt the stability and predictability of employer plan risk pools in ways that are particular to each employer on a case-by-case basis, and in the aggregate may degrade the foundation of our employer-sponsored plan system. We do not think this should be undertaken lightly and urge your caution.

We have similar concerns for provisions that change the affordability percentage from 9.5% to 8.5% and remove indexing of the ACA affordability test. In practical terms, many employers already offer coverage below the indexed 9.5% amount each year in order to ensure that they are “safely” within the ACA affordability requirements. At this time of the year, most plans have

^[1] Bureau of Health Workforce Health Resources and Services Administration, U.S. Department of Health & Human Services, “Designated Health Professional Shortage Areas Statistics,” September 30, 2021, available at: <https://data.hrsa.gov/Default/GenerateHPSAQuarterlyReport>.

^[2] Behavioral health providers are health care practitioners or social and human services providers who offer services for the purpose of treating mental disorders including: psychiatrists, clinical social workers, psychologists, counselors, credentialed substance use specialists, peer support providers, and psychiatric nurse providers.

^[3] Bureau of Health Workforce Health Resources and Services Administration, U.S. Department of Health & Human Services, “Designated Health Professional Shortage Areas Statistics,” September 30, 2021

already determined their low cost option for 2022 and many have already held open enrollment and their employees have made their enrollment choices based on the existing ACA affordability requirements. To change the percentage at this late date would be disruptive to employees and expensive for employers to have their vendors reoffer coverage and reopen open enrollment for 2022. Additionally, such a change may have cafeteria plan, tax reporting, and other administrative implications that are not well analyzed at this point but may be burdensome on the employer to ensure compliance despite their well-made plans for 2022.

More broadly, the existing ACA affordability percentage with indexing is implemented through multi-faceted Treasury/IRS regulations that utilize three distinct safe harbors, versus the plain text of the ACA. This added layer obfuscates and complicates the otherwise simplistic notion of reducing the percentage as it relates to household income. Shortly after the ACA was enacted, it was widely recognized that employers could not know household income and thus were expected to use the promulgated safe harbors to comply. This remains the case and continues to belie any connection to the percentage used to determine an individual's eligibility for a premium tax credit or cost-sharing reduction. Given the well-recognized disconnect, the existing systems, programming, and effort to adopt such a change, and the skewing effect of the implementing regulations, we believe this change is unnecessarily disruptive and expensive for employers, while not resulting in meaningful improvements for individuals and thus should be removed.

The Partnership for Employer-Sponsored Coverage (www.p4esc.org) is an advocacy alliance of employment-based organizations and trade associations representing businesses of all sizes and the more than 181 million American employees and their families who rely on employer-sponsored coverage every day. We are committed to working to ensure that employer-sponsored coverage is strengthened and remains a viable, affordable option for decades to come. We look forward to working with you to ensure employer-sponsored coverage continues to thrive.

Sincerely,

Partnership for Employer-Sponsored Coverage

cc: Members, U.S. Senate and House of Representatives

For more information, please contact P4ESC's executive director [Neil Trautwein](#)