PARTNERSHIP FOR EMPLOYER-SPONSORED COVERAGE

November 19, 2020

Commissioner Charles Rettig
Internal Revenue Service
Attn: CC:PA: LPD:PR (IRS Review of Regulatory Relief) Room 5203
P.O. Box 7604, Ben Franklin Station
Washington, DC 20044

RE: IRS Review of Regulatory and Other Relief To Support Economic Recovery, E.O. 13924
Submitted via www.regulations.gov

Dear Commissioner Rettig:

In response to the notice printed in the *Federal Register* on November 17, 2020, entitled *IRS Review of Regulatory and Other Relief To Support Economic Recovery*, regarding the President's Executive Order 13924, please find attached two letters we sent to Treasury Secretary Mnuchin and you in October and May requesting COVID-related safe harbor compliance relief under the Affordable Care Act's employer reporting system and employer-shared responsibility.

We respectfully request the Internal Revenue Service take these safe harbor requests under strict advisement as the COVID pandemic continues to greatly impact businesses of all sizes and the millions of American families under employment-based coverage. There is an urgent economic need to provide employers with immediate compliance relief from these burdensome requirements that are being further compounded because of state and locally mandated closures and operation changes, and unforeseen workforce transitions.

Thank you for your attention to this request and we welcome the opportunity to discuss in further detail.

Sincerely,

American Health Policy Institute
American Hotel & Lodging Association
American Rental Association
American Staffing Association
Associated Builders and Contractors, Inc.
Associated General Contractors of America
Auto Care Association
The Council of Insurance Agents & Brokers
The ERISA Industry Committee (ERIC)
FMI – The Food Industry Association
HR Policy Association
National Association of Health Underwriters
National Association of Wholesaler-Distributors
National Restaurant Association
National Retail Federation
Retail Industry Leaders Association
Society for Human Resource Management

PARTNERSHIP FOR EMPLOYER-SPONSORED COVERAGE

October 7, 2020

The Honorable Steven Mnuchin
Secretary
U.S. Department of the Treasury
1500 Pennsylvania Avenue, NW
Washington, D.C. 20224

The Honorable Charles Rettig
Commissioner
Internal Revenue Service
1111 Constitution Avenue, NW
Washington, D.C. 20220

Dear Secretary Mnuchin and Commissioner Rettig:

As members of the Partnership for Employer-Sponsored Coverage, we write to follow up on our letter dated May 11, 2020, regarding the request for COVID-related compliance safe harbor relief under the Affordable Care Act's (ACA) reporting requirements (Sections 6055 and 6056) and employer shared responsibility (Section 4980H). While we greatly appreciate the economic relief provided to businesses thus far, we believe more can be done to provide regulatory compliance relief.

The Partnership for Employer-Sponsored Coverage (P4ESC) is an advocacy alliance of employment-based organizations and trade associations representing businesses of all sizes and millions of American workers and their families who rely on employer-sponsored coverage every day. We are working to ensure that employer-sponsored coverage is strengthened and remains a viable, affordable option for decades to come.

The Internal Revenue Service's (IRS) ACA compliance requirements have always been complex and administratively burdensome on employers. With the current pandemic, the compliance complexities and tracking requirements are further exacerbated because employers are managing closures, decreased demand, work from home policies, furloughs, reduced hours, temporary layoffs and more. Employers of all sizes and their employees are continuing to face an unprecedented amount of uncertainty as a result of the COVID-19 pandemic and will do so for months and years to come.

With regards to compliance with the ACA reporting requirements (Sections 6055 and 6056) and employer shared responsibility (Section 4980H), we respectfully request that you:

1) Grant employers safe harbors and flexibility during this crisis and do not penalize businesses for unforeseen closures or rapid staffing changes and transitions that are out of their control. The affordability test is particularly complicated during the pandemic with many businesses experiencing unstable workforces and economic volatility. A workforce is likely to look dramatically different throughout the year than in the first two months of 2020 and thus, we ask that affordability safe harbor compliance measures be implemented to account for these unprecedented times;
2) Require the IRS to review an employer's reported filings to data match against an individual's tax return before issuing a 226-J letter;
3) Provide employers with 90 days, rather than 30 days, to appeal a 226-J tax penalty letter for any tax compliance year; and
4) Provide employers that have to pay a tax penalty with a deferral similar to that offered for other tax-related payments and filings to help with liquidity burdens.

Six months into the COVID-19 pandemic, many businesses are slowly reopening and are restructuring business operations to balance health care and economic impacts. In the meantime, employers are working diligently to comply with new government mandates in response to the pandemic and existing health care compliance requirements under the reporting requirements and employer shared responsibility.

According to a Society for Human Resource Management and Oxford Economics business index examining COVID-19's impact on U.S. business operations and workforce decisions[1], 52 percent of employers have either changed employee hours, or furloughed or laid off workers to reduce costs. These unforeseen changes in business operations will impact the ability of employers to accurately determine when offers of health care coverage need to be made to qualifying employees. Classifying employees incorrectly can lead to inaccurate information being submitted to the IRS in annual information filings. To add, these errors can result in overcounting or undercounting of full-time employees, which will result in significant financial penalties from the IRS. Employers are already experiencing a decrease in revenue by 10-30 percent and unanticipated IRS tax penalties will impede business, workforce and economic recovery efforts. As such, ACA compliance safe harbor relief is merited.

Again, thank you for the efforts by the Treasury Department and IRS to provide economic and regulatory relief to businesses during the COVID-19 pandemic. COVID-related compliance safe harbor relief under the ACA employer requirements is justified and necessary in the current climate. Thank you for your attention to this request and we welcome the opportunity to discuss in further detail.

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Society for Human Resource Management

[1] https://www.shrm.org/about-shrm/press-room/press-releases/pages/shrm-releases-covid-19-us-business-index-.aspx

May 11, 2020

The Honorable Steven Mnuchin
Secretary
U.S. Department of the Treasury

The Honorable Eugene Scalia
Secretary
U.S. Labor Department

The Honorable Alex Azar
Secretary
U.S. Department of Health & Human Services

The Honorable Mitch McConnell
Majority Leader
U.S. Senate

The Honorable Nancy Pelosi
Speaker
U.S. House of Representatives

The Honorable Chuck Schumer
Democratic Leader
U.S. Senate

The Honorable Kevin McCarthy
Republican Leader
U.S. House of Representatives

Dear Secretaries Mnuchin, Scalia and Azar, Speaker Pelosi and Leaders McConnell, Schumer and McCarthy:

As members of the Partnership for Employer-Sponsored Coverage, we thank you for the actions you have taken thus far to address the immediate health and economic needs our nation is facing because of the COVID-19 global pandemic. The employer community joins you in expressing our gratitude to the dedicated health professionals, first responders, frontline employees in various industry sectors, and scientific and medical researchers who are serving ever more critically important roles during the global pandemic.

With recognition that subsequent relief measures and actions are needed to continue to address the health and economic issues stemming from the pandemic, the Partnership for Employer-Sponsored Coverage (P4ESC) respectfully requests that you consider the following benefits, compliance, and operational issues regarding employer-sponsored coverage. P4ESC is an advocacy alliance of employment-based organizations and trade associations representing businesses of all sizes and millions of American workers and their families who rely on employer-sponsored coverage every day. We are working to ensure that employer-sponsored coverage is strengthened and remains a viable, affordable option for decades to come.

Employers of all sizes – small, medium and large – and their employees are facing an unprecedented amount of uncertainty and will continue to do so for months and years to come. The issues raised in this letter have been compiled from initial feedback we solicited from employers regarding benefits, compliance and operations issues they are experiencing or anticipate experiencing as a result of the pandemic.

Coverage and Benefits Issues

Telemedicine
With patients, health providers and coverage plan sponsors continuing to adapt to and comply with remote working and social distancing measures, P4ESC believes the time is ripe to modernize laws to increase access to telemedicine services. We support: 1) treating telemedicine services as an excepted benefit which

would enable employers to offer this type of coverage to part-time and variable workforces; 2) reforming licensure requirements to enable services to be offered across state lines; 3) establishing a national set of standards for telemedicine services to address state-based requirements that have not kept pace with technology, practice site and remote working advances, including eliminating originating site and prior provider relationship requirements; and 4) clarifying that CARES Act telemedicine provisions are effective for plan years on or after January 1, 2019 (employer plan years vary between non-calendar and calendar year basis).

Flexible Spending Arrangements

Because of the current crisis and suspension of non-emergency medical visits, routine appointments and procedures, funds under an employee's Flexible Spending Arrangement (FSAs) will go unused. P4ESC requests flexibility to allow employees to carry-over unused FSA funds from one plan year to the next and an increase in the available roll-over amount. As noted above, employer plan years differ between non-calendar and calendar year durations. The flexibility should be granted for plan years beginning on or after January 1, 2019 and extending through plan years ending on or after December 31, 2021.

COBRA and Coverage Continuation

As you are acutely aware, businesses, and especially those deemed non-essential, will continue to experience serious liquidity and cash flow problems because of the pandemic. Some employers who have had to furlough or lay-off employees have tried to keep workers on their coverage rolls to maintain access to employer-sponsored health insurance; other employers are contributing toward separated workers' COBRA premiums. Additionally, COBRA has always been very administratively complex and complicated for employers and is even more so during the pandemic.

As the Administration and Congress consider proposals to address coverage in these difficult times, P4ESC would like to express our thoughts on the following temporary relief proposals: 1) we would support a full federal government subsidy of separated employees' COBRA premiums for COVID-related coverage enrollment, as proposals for partial subsidies would pose complexity and adverse selection risks; 2) we support providing employers with the full tax deductibility of COBRA premium contributions for furloughed and laid-off employees as is normally allowed for health coverage expense deduction; 3) we request reconsideration of the Administration's recently announced policy to enable employees furloughed or laid-off due to COVID to enroll in COBRA 60 days after separation instead of the law's current 30 day standard; and 4) we support codifying the revised IRS policy with respect to the CARES Act employee retention credit to treat an employer's portion of the health premiums for furloughed and laid-off workers as a qualified payroll expense.

Compliance and Operational Issues

ACA Employer Shared Responsibility & Reporting Requirements

The regulatory compliance requirements under the employer shared responsibility (Section 4980H) mandate are a complex set of regulations to determine: if and when an employer meets the applicable large employer status (ALE); if and when variable workforce employees meet full-time employee status; and if their coverage meets one of the affordability safe harbors based on income and wages. In the current crisis, numerous businesses are being mandated to close or considerably reduce operations for the foreseeable future. Other businesses are adapting to increased staffing needs while serving as essential businesses for the public. For any business undergoing rapid, unforeseen workforce transitions, the compliance complexities and tracking requirements under the employer shared responsibility are compounded. P4ESC requests that employers are granted safe harbors and flexibility during this crisis and not be penalized for unforeseen closures or rapid staffing changes and transitions that are out of their control.

Further, the IRS employer reporting requirements (Sections 6055 and 6056) loom large over employers of all sizes under normal circumstances and are compounded under the current crisis. According to a Society of Human Resource Management (SHRM) health care survey, 62 percent of HR professionals polled said reporting requirements were their biggest ACA challenge. The IRS process involves issuing a Letter 226-J to inform an employer of a tax penalty if the data is not matched to an individual's tax return, regardless of the employer's reporting of an offer of coverage to a full-time employee. An employer has only 30 days to appeal a 226-J letter, which is sent in the mail and not through email. The issuance of 226-J tax penalty letters to employers that have complied with the law's employer mandate requirement leaves the employer vulnerable to tax penalties or requires additional administrative costs and compliance burdens to appeal the letters.

P4ESC requests three safe harbor and regulatory relief measures regarding the reporting requirements: 1) provide employers with longer than 30 days to appeal a 226-J tax penalty letter; 2) provide employers that have to pay a tax penalty with a deferral similar to that offered for other tax-related payments and filings to help with liquidity burdens; and 3) require the IRS to review an employer's reported filings to data match against an individual's tax return before issuing a 226-J letter.

Federal Reporting and Filings under Departments of Labor, Treasury, Health and Human Services
Employers have numerous federal-mandated reporting and filings requirements throughout the year regarding employee benefits and plan offerings. As employers, their third-party administrators and vendors have been mandated to close or move operations to a largely work-from-home basis, annual reporting requirements and filings under various federal laws become increasingly more difficult and burdensome with limited access to traditional mail, proprietary information and human resources IT systems. P4ESC requests that the Administration continue granting or extending reporting and filing delays and safe harbors for various federal requirements throughout the duration of the pandemic.

Future Coverage and Compliance Considerations

The effects of the COVID-19 global pandemic will have far reaching health and economic consequences for years and decades to come. P4ESC certainly understands the necessity of addressing immediate needs during the crisis and hopes you will seriously consider the above requests in subsequent relief measures and administration actions.

While we were surveying employers about immediate COVID-related issues, we also requested that they begin to think about the benefits and compliance issues they may face in the period 6- to 12-months from now and beyond. Initial feedback we received regarding future coverage issues, complexities, and costs include areas such as: actuarial considerations of COVID-related testing and treatments (as well as complexities related to mental health parity rules); self-funded and fully-insured premium increases in 2021 and beyond; increased cost of stop-loss insurance for self-funded employers; and risk pool changes. With the foundation of the employer-sponsored coverage system being rooted in workforce policy and business operations, the COVID pandemic will leave an indelible mark on benefits planning and operations for many years.

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Thank you again for your continued efforts in addressing our nation's public health and financial needs during this unprecedented global pandemic. We are extremely grateful for the relief measures that have been enacted and implemented in such a short amount of time. The Partnership for Employer-Sponsored Coverage welcomes the opportunity to speak with you and your colleagues in further detail about the coverage and compliance issues raised in this initial COVID-related correspondence, and look forward to continuing to work with you to ensure that employer-sponsored coverage is strengthened and preserved for generations to come.

Sincerely,

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The ERISA Industry Committee (ERIC)
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National Association of Wholesaler-Distributors
National Restaurant Association
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Retail Industry Leaders Association
Society for Human Resource Management

CC:
Chairman Charles Grassley, Senate Finance Committee
Senator Ron Wyden, Senate Finance Committee
Chairman Lamar Alexander, Senate HELP Committee
Senator Patty Murray, Senate HELP Committee
Chairman Richard Neal, House Ways and Means Committee
Ranking Member Kevin Brady, House Ways and Means Committee
Chairman Bobby Scott, House Education and Labor Committee
Ranking Member Virginia Foxx, House Education and Labor Committee
Chairman Frank Pallone, House Energy and Commerce Committee
Ranking Member Greg Walden, House Energy and Commerce Committee

Contact: Christine Pollack, P4ESC executive director, christine@pollackconsultingdc.com