

# Employers for Flexibility in Health Care

February 21, 2013

*Submitted electronically via <http://www.regulations.gov>.*

Centers for Medicare & Medicaid Services  
Department of Health and Human Services  
Attention: CMS-2334-P  
P.O. Box 8016  
Baltimore, MD 21244-8016

Request for Comments re: Medicaid, Children's Health Insurance Programs, and Exchanges: Essential Health Benefits in Alternative Benefit Plans, Eligibility Notices, Fair Hearing and Appeals Processes for Medicaid and Exchange Eligibility Appeals and Other Provisions Related to Eligibility and Enrollment for Exchanges, Medicaid and CHIP, and Medicaid Premiums and Cost-Sharing, Department of Health and Human Services (CMS-2334-P)

We are writing in response to the above proposed rule on behalf of the Employers for Flexibility in Health Care ("E-FLEX"), a coalition of leading trade associations and businesses in the retail, restaurant, hospitality, construction, temporary staffing, supermarket, and other service-related industries, as well as employer-sponsored plans insuring millions of American workers. Members of the E-FLEX Coalition are strong supporters of employer-sponsored coverage and have been working with the Administration as you implement the Affordable Care Act ("ACA") to help ensure that employer-sponsored coverage - the backbone of the US health care system - remains a competitive option for all full-time, part-time, temporary and seasonal employees.

In previous comments, the E-FLEX Coalition urged the Administration to use the regulatory process to create a workable reporting and verification system that is simple and centralized, utilizes existing reporting mechanisms where possible, minimizes redundant reporting, and limits the financial and administrative burden on employers. We appreciate the additional clarity provided in this proposed regulation, but it remains difficult to fully assess the workability of HHS' verification, eligibility determination and appeals processes without regulatory guidance on the employer reporting requirements under IRC §6056 and employee communication requirements under FLSA §18B.

In general, we acknowledge the Administration's efforts in this proposed regulation to minimize or, in other cases, to provide standards for communications and notifications between employers and the Exchanges. Multi-state employers in particular are greatly concerned about receiving countless notifications from numerous states in a variety of forms for employees seeking Exchange coverage. However, we do remain concerned about the lack of a centralized, federal process for verifying enrollment in and eligibility for qualifying employer-sponsored coverage and for appealing Exchange eligibility determinations. The current construct may lead to confusion and discourage employers from participating constructively in the verification and appeals process, thus increasing chances for mistakes to be made and unnecessarily exposing employers to tax penalties and employees to subsidy recapture provisions under the law.

*Verification.* We recognize the Administration's efforts to minimize the number of requests for information or, "pings", employers will receive from Exchanges through the verification process. Our understanding of the proposed regulation is that Exchanges will be required to make verifications of enrollment in and eligibility for qualified employer-sponsored insurance through a combination of self-attestation by applicants, checks against existing databases of up-to-date employer-sponsored health insurance coverage data, and direct verification from employers for a statistically significant random sample of applicants. We remain concerned about the size of this

“statistically significant sample” and the burden the resulting “pings” may place on employers. Therefore, we urge the Administration to encourage states to utilize uniform processes in conjunction with HHS and to make clear that employers may authorize other designees to handle the “pings” from Exchanges for direct verification of eligibility and enrollment.

We also urge the Administration to consider whether a more unified approach would reduce the burden for both state Exchanges and employers. In the past, the E-FLEX Coalition has proposed a partially prospective reporting system under IRC §6056 that would provide timely information about the availability of affordable coverage of minimum value - information that could be used to verify enrollment in and availability of employer-sponsored coverage and therefore minimize the need for Exchanges to communicate with, or “ping”, employers.

In addition, we are currently reviewing the pre-enrollment template that employers may opt to pre-populate or populate on an ad hoc basis to assist employees in applying for Exchange coverage. We are continuing to assess whether this template collects the best, most relevant information from employers and how this template may overlap with the notification under FLSA §18B or other communications that employers may choose to engage in with their employees. Nonetheless, we are pleased that HHS views this template as a voluntary measure and provides employers with the flexibility to communicate with their employees about employer-provided health insurance in other ways. We think the form could be clarified in ways to assist in the identification of the employer who is responsible to provide coverage under the law and to whom and where notices should be sent.

*Notification.* We share the Administration’s concerns about streamlining to prevent duplicative or inefficient notifications and would like to continue working with the Administration on this critically important issue. We are particularly worried about the potential for confusion that will result from unnecessary notifications to employers by Exchanges, for example when employers receive a notice of potential tax liability under IRC §4980H even though the employer may not in fact have any tax liability under IRC §4980H.

*Appeals.* Finally, we thank you for acknowledging that the employer appeals process for eligibility determination is separate and distinct from the IRS’ process for determining an employer’s tax liability under IRC §4980H. The appeals process for eligibility determination gives employers an opportunity to rectify the problem in advance if an employer feels that an eligibility determination was made erroneously based on incorrect or incomplete information about the availability of affordable coverage of minimum value to an employee. Many employers are interested not only in mitigating their own penalties before they are assessed under IRC §4980H - but also in mitigating potentially substantial premium credit repayments by their employees before they occur. That said, we are concerned that although some elements of the appeals process must comply with standards laid out in this proposed regulation, each Exchange will be able to establish its own appeals process that will add complexity to the appeals process for large employers who operate in multiple states and may lead to uneven application of the appeals process across states and a significant administrative burden for these employers.

In closing, we would like to thank you again for the opportunity to share our comments with the Administration on provisions of ACA that affect employers, and we appreciate that the Administration has been receptive to the comments from the employer community in developing regulatory guidance. We urge you to continue refining and improving the employer reporting, notification, and appeals processes in the ACA to minimize redundant reporting to multiple states and federal agencies and to promote more uniformity and standardization in employer interactions with Exchanges where centralization at the federal level is not possible.

*Employers for Flexibility in Health Care*

For questions related to this letter, please contact Anne Phelps, Principal, Washington Council Ernst & Young, Ernst & Young LLP, at 202-467-8416, on behalf of the Employers for Flexibility in Health Care Coalition.

Respectfully submitted,

Employers for Flexibility in Health Care Coalition