



June 17, 2011

*Submitted Electronically:* [Notice.comments@irs.counsel.treas.gov](mailto:Notice.comments@irs.counsel.treas.gov)

CC:PA:LPD:PR (Notice 2011-36)  
Room 5203  
Internal Revenue Service  
P.O. Box 7604  
Ben Franklin Station  
Washington, D.C. 20044

**Re: Notice 2011-36 Shared Responsibility for Employers Regarding Health Coverage (Section 4980H)**

To Whom It May Concern:

These comments are submitted to the Treasury Department (Treasury) and the Internal Revenue Service (IRS) on behalf of the Small Business Coalition for Affordable Healthcare (“the Coalition”), pursuant to Notice 2011-36, published in the May 23, 2011 Internal Revenue Bulletin.

Representing the country’s largest, oldest and most respected small business associations, the Coalition has spent more than a decade working to increase access to and affordability of private health insurance. The Coalition’s membership includes small business organizations in the agricultural, construction, food services, floral, wholesaler, retail, rental, entertainment and house ware communities. As part of the nation’s leading small business coalition, our members actively participated in the healthcare debate and advocated for solutions that would promote choice, enhance competition for private insurance and increase the overall affordability of health insurance for our country’s job creators: America’s small businesses.

General Comments on Notice 2011-36

The Coalition appreciates the IRS’s efforts to invite early stakeholder input into the rulemaking process for the employer shared responsibility requirements. Complying with these very complicated requirements is a great concern for business owners, particularly the small business owners the Coalition represents. Many small businesses lack the in-house expertise and resources to comply with complicated regulatory changes.

Hopefully early outreach can help identify the kind of issues and questions that small businesses will struggle with in meeting the employer shared responsibility requirements. The Coalition also urges the IRS and agencies to extend maximum flexibility in any shared responsibility regulation. As the Treasury, the IRS, and other agencies move forward with implementation we hope to offer some insight from the experience of the small business community.

### Definition of Employee

The Notice states that “[for] purposes of §4980H, as under Code provisions generally, ‘employee’ would mean a worker who is an employee under the common law test.” Generally, the Coalition favors applying the relevant common law definition of “employee” for purposes of §4980H, as a limitation on the group of service providers who might be counted against an employer in determining the burdens imposed under the employer mandate. The Coalition suggests that certain types of employees be clarified.

#### *Leased Employees*

The Notice states that “leased employees” as defined in Internal Revenue Code §414(n), although treated as employees of the service recipient for various purposes, are not the employees of the service recipient for purposes of the employer responsibility provisions under §4980H. The Coalition agrees that “leased employees” should be carved-out from the definition of employees. The definition of “leased employee” would provide an important clarification that businesses using the services of temporary staffing firms, “Professional Employer Organizations,” other types of contractors and third-party service providers will not be treated as employers of the employees supplied to them for purposes of §4980H.

This is an important clarification that businesses using the services of temporary staffing firms and other types of contractors and service providers will not be treated as employers for purposes of §4980H.

#### *Seasonal Employees*

Seasonal employees play a large role in many industries common to small businesses, such as construction, retail and agriculture. The treatment of seasonal employees could push many businesses over the 50-employee threshold and could be an area of confusion when counting employees. Clarifying how these employees are counted for purposes of the employer responsibility requirement is especially important to many Coalition members.

Consistent with the statute, the Notice proposes that seasonal employees should not be included in the count when such employees work for an employer for fewer than 120 days per year. The Notice’s discussion of the seasonal worker exception addresses one issue under the statute by stating that, for purposes of the exception, “four calendar months would be treated as the equivalent of 120 days.” The Coalition urges the IRS to further clarify the counting of seasonal employees so as not to trigger the 50-employee threshold unless the employee has worked for 120 *consecutive* days. If a seasonal employee works during one specific season, leaves employment, and returns for a separate season then the count should begin again. For example,

if a seasonal employee works at a flower shop during the Mother's Day holiday and then returns during Easter, these periods should be counted as two separate seasons for purposes of the 120 day count.

A clear definition of seasonal employees will help small businesses to avoid potential mistakes and confusion when counting these workers for the purposes of measuring their total workforce. In addition, requiring businesses to track seasonal employees during different parts of the year would increase complexity for small businesses.

### *Family Members*

Family members working in the business should be excluded for purposes of counting toward the 50-employee threshold for purposes of the employer shared responsibility penalty. Many small businesses are family-run operations, so members of the family often work in the business. Family employees, like the owner, typically work unpredictable schedules and tracking these individuals would be especially difficult and burdensome.

Just as family members are excluded from the count of employees for purposes of the small business healthcare tax credit, they should also be excluded for purposes of the employer shared responsibility requirement.

### Substantial Compliance

The penalties for failing to satisfy the employer responsibility requirements, for as few as one employee, could be catastrophic. Strict compliance is simply impossible in the real world, for many reasons. Data entry mistakes, good faith mistakes in applying the law, systems errors, and misclassifying an employee are all inadvertent errors that could lead to significant financial penalties. When the IRS indicates that proposed regulations would make clear that an "employer offering coverage to substantially all of its full-time employees would not be subject to the assessment payment provisions," the IRS appears to suggest that an employer acting in good faith will not be fined. Although we appreciate the IRS's tacit recognition of good faith compliance, we urge the IRS to more specifically indicate the following:

- If an employer has made a good faith effort to satisfy the employer responsibility requirement, that employer should be deemed to have satisfied it for any month in which:
  - a) At least 90 percent of the persons who must be offered compliant coverage are at all times offered it; and
  - b) The employer takes reasonable action to prospectively correct any coverage errors after it discovers them to minimize their recurrence.
  - c) In any month in which an employer intentionally fails to cover persons it knows (or in good faith should know) it must cover, it could not take advantage of this rule.

### Conclusion

Again, the Coalition appreciates the IRS's request for information over two years before compliance with the statutory provision is required. Early outreach and consultation with the small business community can reduce potential problems the employer shared responsibility requirement will most certainly create. As the IRS has noted, shared responsibility will prove burdensome and difficult to comply with, particularly for small businesses. Despite the early outreach, we remain concerned that the application of the employer shared responsibility requirements will have a detrimental impact on small businesses and their employees and we strongly support their repeal.

We appreciate the opportunity to comment and provide the unique prospective of small businesses. Thank you for your time and consideration.

Sincerely,

American Bakers Association  
American Farm Bureau Federation  
American Foundry Society  
American Hotel & Lodging Association  
American Rental Association  
Associated General Contractors of America  
Automotive Aftermarket Industry Association  
Independent Office Products and Furniture Dealers Association  
International Franchise Association  
International Housewares Association  
Manufacturers' Agents Association for the Foodservice Industry  
National Association of Wholesaler-Distributors  
National Club Association  
National Federation of Independent Business  
National Roofing Contractors Association  
North American Die Casting Association  
Service Station Dealers of America and Allied Trades  
Small Business and Entrepreneurship Council  
Specialty Equipment Market Association  
Textile Rental Services Association of America  
Tire Industry Association  
Turfgrass Producers International  
U.S. Chamber of Commerce