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General Comment

Please see attached comments.

Attachments

IRS-2010-0010-0952.1: Comment on FR Doc # 2010-14487

COMMENTS OF
MCKENZIE ROTHWELL BARLOW & KORPI, P.S.
TO THE
INTERIM FINAL RULES GROUP HEALTH PLANS AND HEALTH INSURANCE ISSUERS RELATING TO STATUS AS A GRANDFATHERED HEALTH PLAN UNDER THE PATIENT PROTECTION AND AFFORDABLE CARE ACT
26 CFR PARTS 54 AND 602, 29 CFR PART 2590, 45 CFR PART 147

The law firm of McKenzie Rothwell Barlow & Korpi, P.S., on behalf of approximately 100 jointly sponsored multiemployer trusts, submits the following comments to the Interim Final Rules Group Health Plans and Health Insurance Issuers Relating to Status as a Grandfathered Health Plan under the Patient Protection and Affordable Care Act ("Proposed Rule").

I. INTEREST OF MCKENZIE ROTHWELL BARLOW & KORPI

McKenzie Rothwell Barlow & Korpi, P.S. provides consultation, collections, and litigation services to over 100 Taft-Hartley Trusts, including many multiemployer health and welfare plans. These plans range in size from less than 100 participants to over 60,000 participants covering participants in various states including Washington, Oregon, California, Idaho, Alaska, and Montana. Representative clients include funds in the following industries:

Construction (Operating Engineers, Carpenters, Laborers, Plumbers, Ironworkers, Cement Masons and Plasterers, Bricklayers, Glassworkers, Sheet Metal Workers and Asbestos Workers);

Maritime (Longshoremen, Inlandboatmen and Masters, Mates and Pilots);

Retail and Office Workers (Clerks, Meat Cutters, Bakers, Pharmacists and Office Workers);

Manufacturing and Warehousing (Machinists, Metal Fabricators, Warehousemen and Millmen); and

Transportation (Teamsters, Automotive Machinists).

McKenzie Rothwell Barlow & Korpi, P.S. does not represent labor organizations or employers in an individual capacity, but only in their capacity as sponsors of the plans. McKenzie Rothwell Barlow & Korpi, P.S. and our clients have a significant interest in the Proposed Rule because although the Proposed Rule impacts how the Trusts provide benefits to their participants.

II. COMMENTS TO PROPOSED RULE

1. Need for Specific Guidance in Regards to Multiemployer Plans

The grandfathering regulations do not address how they will apply to multiemployer plans. ERISA § 3(37) defines multiemployer plans as a plan to which more than one employer is required pursuant to terms of collective bargaining agreements. Multiemployer plans raise unique issues given the large number of employees that may contribute to them, the fact that contribution and participation choices are controlled by individual bargaining parties independent of the plan sponsor, have unique contribution formulas (hour banks, dollar banks, etc.) than single employer plans and provide retiree coverage at much higher levels.

These issues raise a need for provisions dealing with multiemployer plan issues.

2. New Collectively Bargaining Participation in Multiemployer Trusts

The interim final regulations, 29 CFR 2590.715-1251(b)(1), allows a group health plan to cover new employees and their dependents hired after March 23, 2010. The regulations then indicate this is subject to 29 CFR 2590.715-1251(b)(2) which is titled "Anti-Abuse Rules." Subsection (ii) gives the following example:

> (ii) Change in plan eligibility. A group health plan or health insurance coverage (including a benefit package under a group health plan) ceases to be a grandfathered health plan if—
>
> (A) Employees are transferred into the plan or health insurance coverage (the transferee plan) from a plan or health insurance coverage under which the employees were covered on March 23, 2010 (the transferor plan);
>
> (B) Comparing the terms of the transferee plan with those of the transferor plan (as in effect on March 23, 2010) and treating the transferee plan as if it were an amendment of the transferor plan would cause a loss of grandfather status under the provisions of paragraph (g)(1) of this section; and
>
> (C) There was no bona fide employment-based reason to transfer the employees into the transferee plan. For this purpose, changing the terms or cost of coverage is not a bona fide employment-based reason.

For multiemployer plans, the governing plan documents generally provide that an employer which has a bargaining agreement with a participating union may negotiate to participate in a particular multiemployer plan or benefit option. The proposed regulations raise a concern about new groups entering a multiemployer plan or benefit option. Multiemployer plans would need to monitor each newly entering group that may negotiate into the plan after March

23, 2010 to determine if the newly entering group has made any of the changes contained in 29 CFR 2590.715-1251(g)(1). The interim final regulations suggest that if any such group enters a multiemployer plan, the entire plan may lose its grandfathered status.

This places many multiemployer plans in an untenable situation. There choices are freezing participation as of March 23, 2010 (including expelling groups that may have bargained into the multiemployer plan after March 23, 2010), monitoring each new collective bargaining agreement to assure there is no disqualifying changes or losing grandfathered status.

The interim final regulations should recognize an exception for bargaining groups that negotiate into a collectively bargained plan. The exception should recognize that negotiating into a multiemployer plan will not cause a loss of grandfathered status. If there is concern, this could be addressed by either placing a caveat that a negotiated change shall not be for a purpose inconsistent with the PPACA or placing a percentage limitation on the number of participants that could be bargained into an existing plan.

We would suggest the following modification to the proposed rules:

(2) Anti-abuse rules

* * *

(ii) Change in plan eligibility

* * *

(c) There was no bona fide employment-based reason to transfer the employees into the transferee plan. For purposes of this rule, a transfer pursuant to a collective bargaining into an existing benefit option contained in a multiemployer plan shall be presumed to be a bona fide employment-based reason and shall affect the grandfathered status of the transferee plan. This presumption shall not exist if more than 25% of the participants in any plan option maintained by a multiemployer plan have been transferred into it after March 23, 2010.

3. Treatment of Hourly Contribution Rates

29 CFR 715-1251(g)(1) of the interim regulations describes changes that will cause a loss of grandfathered status. Subsection (g)(1)(v) deals with a decrease in contribution rates by employers and employee organizations. The regulations states that any decrease is measured as a percentage of the employer contribution as compared to the total cost of the plan. See 29 CFR 715-1251(g)(3)(iii)(A).

There is no similar percentage limitation stated where the contributions are based on an hourly rate. Many multiemployer plans (particularly in the construction industry) have

contributions based on per-hour basis. Does a plan lose grandfathered status if the rate drops after March 23, 2010? Does it make a difference if their plan has employee payments and those increased by more than 5%?

Many construction industry funds have dollar or hour banks. This means that contributory hours are placed in a bank. A set amount is withdrawn each month (for example, 130 hours or $800) to provide coverage. Amounts contributed that exceed the withdrawal factor are banked. Is the test whether there is a 5% or more increase in the amount withdrawn from the bank?

4. Retiree Only Plans

The Preamble to the final regulations indicates that the exception for retiree-only plans under ERISA § 732 will continue in effect for retiree-only plans:

> Accordingly, the exceptions of ERISA § 732 and Code § 9831 for very small plans and certain retiree-only health plans, and for excepted benefits, remain in effect and thus ERISA § 715 and Code § 9815 as added by the Affordable Care Act do not apply to such plans as excepted benefits.

At issue is whether this exception includes retiree-only options that are contained within the same multiemployer plans with plans offered only to active employers. May multiemployer plans have retiree options which are completely separate from any active options. Such plans have separate funding sources, separate reserves and provisions that prevent use of funds contributed for active groups being used for retiree coverage. The only linkage between the plans is that to be eligible for the retiree plan, the employee must have participated in the active plan prior to retirement.

Guidance should be issued clarifying that those distinct retiree-only options are to be treated as retiree-only plans. They are plan options that are completely separate from any active plan.

Absent such a ruling, the Department should provide guidance that a decision to create a separate retiree-only entity after March 23, 2010 is appropriate and any such new entity would be treated as a retiree-only plan.

Thank you for the opportunity to comment on these Regulations.