Office of Health Plan Standards and Compliance Assistance
Employee Benefits Security Administration
Room N-5653
U.S. Department of Labor
200 Constitution Avenue, NW
Washington, DC 20210

April 9, 2012

Submitted electronically at: e-ohpsca-er.ebsa@dol.gov

Dear Sir/Madam:

On behalf of the consumer organizations below, we urge you to consider the comments below in the preparation of a proposed regulation or other guidance on implementation of employer shared responsibility and related provisions. Employer-sponsored health insurance is the foundation of the coverage expansions of the Affordable Care Act (ACA). The Technical Release 2012-01 Frequently-Asked-Questions (FAQ) document issued by the Departments of Labor, Health and Human Services, and Treasury on February 9, 2012, invites comments on the approaches being taken by the Departments. In general, our comments focus on closing gaps in affordable coverage for workers.

Do Not Further Delay Automatic Enrollment (A1)

We are very disappointed that the Department plans to delay the issuance of automatic enrollment guidance and does not expect employers to comply with the provision by 2014. Automatic enrollment is an important tool in achieving universal coverage under the ACA. A survey of employers by Mercer estimated that automatic enrollment alone would increase employer-based coverage by 2%.[1] That would be an increase of about 3 million individuals.[2] A delay of the automatic enrollment provision could result in many of these 3 million individuals being uninsured.

It is important that automatic enrollment begin no later than plan years starting January 1, 2014, in order to work smoothly with other provisions of the ACA. Significant changes are happening in 2014 including the launch of the Health Insurance Exchanges, the employer shared responsibility provisions, and the individual requirement to have minimum essential coverage. Workers anticipate changes in health insurance in 2014, making it a good time to transition from opt-in to automatic enrollment. Automatic enrollment also makes the process smoother for workers because it will reduce the chances of being left uninsured and potentially facing a penalty. This is especially true for employees that may be getting an offer of coverage through their employer for the first time.

[1] http://www.mercer.com/press-releases/1421820
[2] Based on figures by Kaiser Family Foundation that 49% of the 305.2 million people that had health insurance in the United States in 2010 had employer-sponsored coverage, http://facts.kff.org/chart.aspx?ch=477

Ensure Families Have Access to Affordable Coverage (A2)

We understand the need to provide a safe harbor for employers as described in Notice 2011-73 to allow an employer to use an employee's Form W-2 wages in determining the affordability of employer coverage. However, we want to take this opportunity to reiterate the importance of considering not only the needs of employers, but the needs of workers and their families. Under the proposed Treasury regulations interpreting the premium tax credit, many families would be locked out of affordable coverage in the exchange because a worker's self-only coverage is affordable, even if family coverage is not. In addition to the hardship that creates for families, it leaves employers in the situation of choosing between paying the shared responsibility penalty, offering affordable self-only coverage that they know will prevent their employees' families from accessing affordable coverage, or offering affordable family coverage that may be too costly for the firm. We urge the Department of Labor to work with Treasury to correct this problem so workers and their families can have access to affordable coverage as promised in the ACA.

Minimize the Potential for Manipulation Under Look-Back and Stability Periods (A4)

We are concerned that the allowance of up to 12 months of look-back and stability periods will create opportunities for manipulation by employers, particularly in industries where hours fluctuate over the course of a year or where there is high employee turnover. Such a system could be manipulated so that an employee who regularly works over 30 hours a week could still be counted as part-time. As a result, fewer employees will be offered health coverage.

Limit Evaluation Period to Three Months (A5)

Employers control the hours worked by an employee. An employer should be able to determine based on a reasonable expectation whether an employee will be full or part-time. The FAQ discusses certain circumstances that would allow employers six months to determine whether a newly-hired employee is a full-time employee. We oppose the allowance of a second three-month evaluation period because the flexibility could be abused, particularly in high-turnover industries. The second-three month period creates potential for employers to hire an employee and falsely claim that there is an expectation that the employee will work part-time. At the end of the first three months of employment, if that employee actually worked full-time, the employer can claim the need for a second three-month period to determine if the employee is full-time. This causes delays in the offer of coverage to the employee, with no ramifications for the employer

The use of the second three-month period is consequential for families. A three-month gap in insurance coverage does not trigger the shared responsibility payment for individuals, so some families (unadvisedly) may accept that gap in coverage. But if the employer extends this period by a second three months, the employee may incur a shared responsibility payment.

While we do not support a second three-month evaluation period, if regulations or guidance do include such a provision, it should be extremely limited in use and employees should be notified at the time of employment that they may not be offered insurance for six months. If an employee knows that coverage will not start for six months, rather than three months, the employee can make educated coverage decisions, such as enrolling through a Health Insurance Exchange while eligible for a special enrollment period. There should also a review process by

the Department, or by the IRS in enforcing the shared responsibility payments of 4980H, to ensure that employers are not manipulating the system.

It should be clarified that nothing in the proposed regulations or guidance will eliminate an employee's rights under ERISA or an individual's right to appeal a determination of eligibility to participate in the plan under Section 1001 of the ACA. If an employee meets all eligibility requirements of a health plan, the employer cannot use the allowance of a second three-month evaluation period to prevent the employee from enrolling in coverage.

Provide Notice to Employees

New coverage options in the exchanges, with tax credits to make that coverage more affordable, will be available to families that don't have access to affordable employment-based coverage. When families are deciding how to secure health care for the year, it is important that they understand their options. The continued use of a 90-day waiting period, the ability of employers to use an additional three-month period to determine an employee's full- or part-time status, complications created by look-back and stability periods, and other possible hour-of-service and other exceptions to immediate health coverage are all potentially confusing to employees who need to arrange coverage for their family for the year. Employers should provide new employees with a clear, individualized statement of the law, the employer's policy for health insurance coverage, and the date or conditions under which an employee can get coverage.

The provision of such a notice to employees could also ensure that employers do not abuse the untested flexibility being extended through the creation of the second three-month evaluation period. For instance, an employee who was hired with the understanding of full-time employment and who has worked full-time hours in the first three-month period for an employer that otherwise offers coverage after a 90-day waiting period should be entitled to coverage and is likely eligible for coverage under the terms of the plan whether or not the employer is claiming a need for a second three-month evaluation period. If the employee is kept in the dark about the employer's coverage policies and the employee's ERISA rights to coverage, that employer could routinely take advantage of the second three-month period to delay an offer of coverage. Additionally, if the employer is required to explain the reason for the additional three-month coverage delay, the employee has the opportunity to raise a legitimate complaint to the employer or to the Department of Labor. While most employers will not exploit the use of this second three-month period to delay an offer of coverage to an otherwise-eligible employee, keeping workers informed of their benefits is one more way to ensure the policy works as intended.

Thank you for your consideration of these comments in the forthcoming proposed regulation or other guidance.

Sincerely,

American Federation of State, County & Municipal Employees
Center on Budget and Policy Priorities
Families USA
Health Care for America Now
National Women's Law Center