Coalition to Promote Independent Entrepreneurs

ICCoalition.org · (202) 659-0878

March 18, 2013

BY EMAIL
CC:PA:LPD:PR (REG-138006-12)
Internal Revenue Service
Room 5203
POB 7604
Ben Franklin Station
Washington, D.C. 20044

Re: Notice of Proposed Rulemaking re Affordable Care Act
RIN 1545-BL33
CC:PA:LPD:PR (REG-138006-12)

Dear Sir or Madam:

The Coalition to Promote Independent Entrepreneurs (the "Coalition"), www.iccoalition.org, submits these comments concerning the above-referenced notice of proposed rulemaking, released on December 28, 2012.

The Coalition respectfully submits that the definitions given the terms "employee" and "employer" for purposes of the employer mandate contained in the Affordable Care Act (the "ACA"), codified at section 4980H of the Internal Revenue Code of 1986, as amended (the "Code"), should conform to the definitions given such terms for purposes Subtitle C of the Code, which governs federal employment taxes. While Congress focused on expanding health-benefits coverage to employees under the ACA, it did not intend to upset previous Congressional enactments governing worker status. As further described below, failure to conform the above-referenced definitions would create untenable tensions for employers.

The Coalition also urges that guidance be provided to clarify the procedure a taxpayer should follow when electing the various time periods the proposed regulations define for purposes of complying with the ACA's employer mandate on a look-back basis.

1. Definitions for "Employee" and "Employer"

The ACA's employer mandate is premised on a traditional employment relationship, where an employee performs services for an employer in exchange for the employer paying wages to the employee. Under this arrangement, the employer will report on an Internal Revenue Service ("IRS") Form W-2 the amount of wages the employer paid the employee during a calendar year.

The Coalition believes the proposed regulations properly adopt the common-law test[1] for purposes of defining the terms "employee" and "employer," generally, for purposes of the ACA, but believes the terms also should incorporate the special rules for determining an individual's status for purposes of Subtitle C of the Code.

To the extent that ACA compliance deviates from the existing federal employment-tax compliance regimen, the potential for taxpayer uncertainty and confusion increases dramatically. It is acknowledged that the pure common-law definition given the terms "employee" and "employer" for purposes of the Code provisions governing employee benefits, and the Employee Retirement Income Security Act of 1974 ("ERISA"), differs from the definitions given such terms for purposes of Subtitle C of the Code, but the employee-benefit programs governed by the employee-benefit Code provisions and ERISA are elective. An employer is not required to maintain a retirement program or a welfare benefit plan.

The ACA is fundamentally different, as it *requires* an employer to offer specified minimum essential coverage ("MEC") to individuals who are deemed "employees" for purposes of the ACA and meet other specified conditions, or else pay an "assessable payment." Furthermore, other aspects of the ACA suggest that the ACA compliance regimen is intended to be in harmony with Subtitle C of the Code.

For example, the proposed regulations provide a safe harbor[2] under which an employer can determine the "affordability" of the MEC it offers an employee by reference to the employee's "wages," as defined by Code section 3401(a), which Code provision is contained in Subtitle C. Furthermore, the safe harbor is specifically predicated on the employee's wages, as reported on the employee's IRS Form W-2.

Similarly, subsection 6051(a)(14) of the Code, which the ACA also enacted, requires an employer to report on an employee's IRS Form W-2 the cost of coverage to the employee under an employer-sponsored group health plan.

Both of the just-referenced ACA provisions are predicated on an employer filing a Form W-2 relative to covered employees. An employer's duty under the Code to file a Form W-2 is governed by Subtitle C of the Code, and is premised on the definitions given the terms "employee" and "employer" for purposes of Subtitle C. It follows that the just-described provisions, which are predicated on a Form W-2 being issued to an employee, could create a compliance dilemma for a company with respect to an individual who is an employee for purposes of the ACA, but not an employee for purposes of Subtitle C of the Code.[3] This is

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[1] Prop. Treas. Reg. §54.4980H-1(a)(14).

[2] Prop. Treas. Reg. §54.4980H-5(e)(2)(ii).

[3] Furthermore, the only taxpayers on which Code section 6051(a) imposes a Form W-2 reporting obligation are those:

> required to deduct and withhold from an employee a tax under section 3101 or 3402, or who would have been required to deduct and withhold a tax under section 3402 (determined without regard to subsection (n)) *if*

because an employer only issues Forms W-2 to individuals who are employees of the employer for purposes of Subtitle C of the Code.

Subtitle C of the Code's principal variances from the pure common-law test are the definitions given certain categories of individuals as statutory employees[4] or statutory nonemployees.[5] Congress enacted these provisions to create a high level of certainty as to the proper classification of the affected workers.

In addition to the statutory clarifications contained in Subtitle C of the Code, Congress also enacted a broad safe harbor to provide prospective certainty for purposes of Subtitle C of the Code for qualifying companies that do business with independent contractors, namely, section 530 of the Revenue Act of 1978 ("Section 530").

The Coalition submits that taxpayers covered by Section 530 would be subjected to a severe compliance dilemma if the definitions of "employee" and "employer" for purposes of the ACA do not follow the definitions given those terms for purposes of Subtitle C of the Code.

As noted, two important features of the ACA are premised on a covered employer issuing Forms W-2 to a covered employee. A company's issuance of a Form W-2 to a Section 530-protected individual would be disastrous, as it would invalidate the company's Section 530 protection. This is because the eligibility criteria for Section 530 require that:

> all Federal tax returns (including information returns) required to be filed by the taxpayer with respect to such individual ... are filed on a basis consistent with the taxpayer's treatment of such individual as not being an employee.[6]
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> ...
>
> [Section 530 will not apply] with respect to the treatment of any individual for employment tax purposes ... if the taxpayer ... has treated any individual holding a substantially similar position as an

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> the employee had claimed no more than one withholding exemption, or every employer engaged in a trade or business who pays remuneration for services performed by an employee, including the cash value of such remuneration paid in any medium other than cash,

In this regard, the terms "employee" and "employer," as used in Code section 6051(a), are governed by the definitions given such terms in Subtitle C of the Code. It follows that if an individual is not an employee of a taxpayer for purposes of Subtitle C of the Code, the taxpayer arguably would have no Form W-2 reporting duty with respect to the individual, notwithstanding the ACA.

[4] *E.g.*, Code section 3121(d).

[5] *E.g.*, Code section 3509.

[6] *See*, Section 530(a)(1)(B).

> employee for purposes of the employment taxes for any period beginning after December 31, 1977.[7]

A company will violate the foregoing Section 530 requirements if the company were to file a Form W-2 with respect to an individual currently covered by Section 530.[8] This requirement permits no exception; a company filing one Form W-2 with respect to an individual will be *permanently* ineligible for Section 530 protection with respect to that individual – and all other individuals who hold a position "substantially similar" to that individual.[9] It takes only one violation to irrevocably invalidate a company's Section 530 protection with respect to all workers whose relationship with the company is "substantially similar" to the individual with respect to whom the Form W-2 was issued.

This compliance dilemma presumably was not intended, and it is easily resolved. It can be resolved by conforming the definitions of "employee" and "employer" for purposes of the ACA to the definitions given the terms for purposes of Subtitle C of the Code. In this regard, the court observed in *Bendure v. United States*, 695 F.2d 1383, 1386-1387 (Fed. Cir. 1982) that:

> It is axiomatic that courts must interpret statutes, whenever possible, in such manner as to avoid conflict between them. *Morton v. Mancari*, 417 U.S. 535, 551, 41 L. Ed. 2d 290, 94 S. Ct. 2474 (1974).

The Coalition submits that this same axiom should guide the development of regulations interpreting statutory provisions. The just-described compliance conflict for taxpayers that would result from defining the terms "employee" and "employer" for purposes of the ACA without incorporating the additional special rules that apply for purposes of Subtitle C of the Code is avoidable.

The Coalition respectfully urges that the definitions given the terms "employee" and "employer" for purposes of the ACA be the same as the definitions given such terms for purposes Subtitle C of the Code, which governs federal employment taxes.

2. Clarify Procedure for Electing Time Periods

The proposed regulations provide that an applicable large employer[10] electing to determine full-time employee status[11] based on a look-back method needs to elect certain time periods, e.g., an initial measurement period,[12] a standard measurement period,[13] a stability

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[7] *See*, Section 530(a)(3).

[8] *See*, Rev. Proc. 85-18, 1985 C.B. 518.

[9] *See, e.g., Institute for Resource Management, Inc., v. United States*, 90-2 U.S.T.C. ¶ 50,586 (Cl.Ct. 1990)

[10] Prop. Treas. Reg. §54.4980H-1(a)(4).

[11] Prop. Treas. Reg. §54.4980H-1(a)(18).

[12] Prop. Treas. Reg. §54.4980H-1(a)(22).

period[14] and, if applicable, an administrative period.[15] The proposed regulations are silent as to the methodology for making these elections.

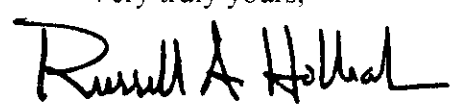
The Coalition urges that guidance be provided that specifies an acceptable method for making the above-referenced elections under the ACA.

3. Conclusion

The Coalition appreciates the opportunity to submit these comments. It respectfully urges that the definitions given the terms "employee" and "employer" for purposes of the ACA be conformed to the definitions given those terms for purposes of Subtitle C of the Code. In addition, we urge that guidance be provided on the proper method for electing the various time periods that the proposed regulations establish for purposes of complying with the employer mandate on a look-back basis.

Thank you very much for your consideration.

Very truly yours,



Russell A. Hollrah
Executive Director

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[13] Prop. Treas. Reg. §54.4980H-1(a) (40).
[14] Prop. Treas. Reg. §54.4980H-1(a) (39).
[15] Prop. Treas. Reg. §54.4980H-1(a) (1).