

American Federation of Labor and Congress of Industrial Organizations



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Submitted electronically to Christie.A.Preston@irs.gov

November 3, 2014

Stacey Becker
Internal Revenue Service
Room 6526
1111 Constitution Avenue NW
Washington, DC 20224

Re: Proposed Information Collection; Comment Request; Forms 1094-C and 1095-C
OMB Number 1545-2251 (79 Fed. Reg. 52117)
Proposed Information Collection; Comment Request; Forms 1094-B and 1095-B
OMB Number 1545-2252 (79 Fed. Reg. 52118)

Ladies and Gentlemen:

These comments on the drafts of Forms 1094-C and 1095-C and 2014 Instructions and the drafts of Forms 1094-B and 1095-B and 2014 Instructions issued by the Department of the Treasury ("Treasury") and Internal Revenue Service ("IRS")¹ are submitted by the American Federation of Labor and Congress of Industrial Organizations ("AFL-CIO") and its 56 affiliated unions. The AFL-CIO represents more than 12.5 million workers across the country in all sectors of our economy, including those working in manufacturing, construction, transportation, grocery and retail stores, food processing and meatpacking, health care, education, hospitality, entertainment and state and local governments. Our affiliated unions negotiate health care benefits for millions of workers, retirees, and their family members, and these benefits are provided through single employer and multiemployer plans, both insured and self-funded.

¹ The Notice and Request for Comment on the Proposed Information Collections were published in the Federal Register on September 2, 2014 (79 Fed. Reg. 52117 and 79 Fed. Reg. 52118) and are available at <http://www.gpo.gov/fdsys/pkg/FR-2014-09-02/pdf/2014-20802.pdf> (Forms 1094-C and 1095-C) and <http://www.gpo.gov/fdsys/pkg/FR-2014-09-02/pdf/2014-20808.pdf> (Forms 1094-B and 1095-B).

The draft Forms and related Instructions implement the reporting requirements of Internal Revenue Code Sections 6055 and 6056.² Code Section 6055 addresses the reporting of minimum essential coverage (“MEC Reporting”) by those entities, including multiemployer plans, providing such coverage. Code Section 6056 requires applicable large employers, those who must satisfy the shared responsibility requirements of Code Section 4980H, to report on the health care coverage provided to full-time employees (“Employer Reporting”). Final rules regarding MEC Reporting and Employer Reporting were issued by Treasury and IRS on March 10, 2014.³ The draft Instructions for the MEC and Employer Reporting Forms were published on August 28, 2014.⁴

The AFL-CIO appreciates the efforts of Treasury and IRS to develop workable reporting rules reflecting the relationship between contributing employers and multiemployer plans. In addition, the agencies’ view, stated in the preamble to the final Employer Reporting rule, that they lack statutory authority to transfer the Employer Reporting obligation from participating employers to the multiemployer plans is one we support as it also recognizes the interaction between contributing employers and plans.⁵

As discussed later in these comments, we support the current draft Instructions and Forms subject to including an important clarification in the Instructions for Forms 1094-C and 1095-C. The current drafts, as we understand them, permit multiemployer plans to meet their MEC Reporting obligation and allow contributing employers to satisfy their Employer Reporting obligation consistent with how multiemployer plans currently operate.

There has been some confusion, including some resulting from public comments by agency staff, about the specific information employers may need to obtain from multiemployer

² Unless otherwise indicated, all “Section” references are to sections of the Internal Revenue Code of 1986, as amended (“Code”).

³ Information Reporting of Minimum Essential Coverage, 79 Fed. Reg. 13220 (March 10, 2014) *available at* <http://www.gpo.gov/fdsys/pkg/FR-2014-03-10/pdf/2014-05051.pdf> and Information Reporting by Applicable Large Employers on Health Insurance Coverage Offered Under Employer-Sponsored Plans, 79 Fed. Reg. 13231 (March 10, 2014) *available at* <http://www.gpo.gov/fdsys/pkg/FR-2014-03-10/pdf/2014-05050.pdf> (“ALE Information Reporting”).

⁴ The MEC Reporting Forms are the Form 1094-B, the Transmittal of Health Coverage Information Returns (*available at* <http://www.irs.gov/pub/irs-dft/f1094b--dft.pdf>) and the Form 1095-B, Health Coverage (*available at* <http://www.irs.gov/pub/irs-dft/f1095b--dft.pdf>). The Employer Reporting Forms are the Form 1094-C, the Transmittal of Employer-Provided Health Insurance Offer and Coverage Information Returns (*available at* <http://www.irs.gov/pub/irs-dft/f1094c--dft.pdf>), the Form 1095-C, Employer-Provided Health Insurance Offer and Coverage (*available at* <http://www.irs.gov/pub/irs-dft/f1095c--dft.pdf>) and the draft 2014 Instructions for these Forms (*available at* <http://www.irs.gov/pub/irs-dft/i109495c--dft.pdf>). Forms were initially published on July 28, and three of the four Forms were modified as of October 15, 2014.

⁵ ALE Information Reporting, 79 Fed. Reg. at 13245.

plans to complete Form 1095-C. The AFL-CIO supports the National Coordinating Committee for Multiemployer Plans (“NCCMP”) in its opposition to any requirement that multiemployer plans report eligibility information to contributing employers. The draft Forms provide all the information necessary under the Affordable Care Act⁶ to assure that applicable large employers meet their obligations. Requiring multiemployer plans to report eligibility information to employers is not supported by the Affordable Care Act. Moreover, any such requirement imposes unnecessary and unreasonably inefficient obligations on both multiemployer plans and contributing employers.

Our reading of the Instructions for Line 14 of Form 1095-C is that no code should be entered if the employer relies on the multiemployer interim guidance⁷ as indicated on Line 16 of the Form. The text of the instruction, particularly the parenthetical, is confusing. We support the NCCMP recommendation that the last sentence of the second paragraph of the Instructions for Line 14 be changed to eliminate the parenthetical.⁸ The proposed modification would eliminate any confusion about whether employers must enter a code for coverage based on whether the full-time employee actually met the multiemployer plan’s eligibility requirements. Any such reporting is inconsistent with the multiemployer interim guidance and requires multiemployer plans to share eligibility and perhaps other information with contributing employers on an employee-by-employee basis. Generally, there is no current mechanism for information sharing of this kind.

Our comments focus on the MEC Reporting obligation of multiemployer plans under Section 6055 and the relationship of the plan and contributing employers with respect to the Employer Reporting obligation under Section 6056. In order to implement the statutory requirements, it is important to understand the relationship between the plan and contributing employers.

Relationship Between Contributing Employers and a Multiemployer Plan

Contributing employers submit work data and remit contributions to a multiemployer plan for each employee who works in covered employment under the governing collective

⁶ The “Affordable Care Act” or “Act” refers to the Patient Protection and Affordable Care Act, P.L. 111-148 (“PPACA”), and the Health Care and Education Reconciliation Act of 2010, P.L. 111-152 (“HCERA”).

⁷ The interim guidance is included in the preamble to the final regulations on Shared Responsibility for Employers Regarding Health Coverage, 79 Fed. Reg. 8544 (February 12, 2014) *available at* <http://www.gpo.gov/fdsys/pkg/FR-2014-02-12/pdf/2014-03082.pdf>. Under the multiemployer interim guidance, applicable large employers will not be subject to an assessable payment if a collective bargaining or participation agreement requires contributions to a multiemployer plan that offers affordable, minimum value coverage to individuals satisfying the plan’s eligibility conditions (and their dependents).

⁸ The suggested revision would provide “Do not enter a code for any type of health coverage the employer is treated as having offered under the dependent coverage transition relief, non-calendar year transition relief, or multiemployer arrangement interim guidance.”

bargaining agreement. The work data may take different forms, such as hours worked, days worked or some other measure specified in the collective bargaining agreement. With its submission of the required work data and related contributions, a contributing employer satisfies its reporting and contribution obligations to the plan.

The trustees of the multiemployer plan, as part of their responsibilities, establish the eligibility rules for plan participants. They are also responsible for enforcing the terms of the trust agreement and assuring that contributing employers properly remit the contributions and information required by the collective bargaining agreement. The trustees have no obligation to provide contributing employers with eligibility information or notify them when participants or their dependents attain eligibility, and there is no established legal requirement for trustees to provide that information to contributing employers.

In recognition of this operational structure, Treasury and IRS adopted specific guidance for applicable large employers contributing to multiemployer plans that describes how they meet their shared responsibility requirement under Section 4980H.

Contributing Employers, Multiemployer Plans and Section 4980H

The final Employer Shared Responsibility rule provides that an applicable large employer that is a contributing employer to a multiemployer plan meets its obligations under Section 4980H with respect to a full-time employee if the employer is required by a collective bargaining agreement (or appropriate related participation agreement) to contribute on behalf of that employee to a plan that provides coverage to individuals who satisfy the plan's eligibility conditions and that coverage meets the affordability and minimum value requirements and is offered to those individuals' dependents.⁹

We believe the draft Forms and Instructions, as we read them, are consistent with both the multiemployer interim guidance under Section 4980H and the MEC and Employer Reporting requirements under Sections 6055 and 6056 and the implementing regulations. Multiemployer plans will report the necessary information with respect to minimum essential coverage on Form 1095-B. Large contributing employers are able to indicate on Line 16 of Form 1095-C that multiemployer plan contributions are required, and then the information filed on the plan's Form 1095-B coordinates with the employer report. This approach reflects which party (the plan or the contributing employer) has the relevant information and provides a workable approach that is, consistent with the multiemployer interim guidance under the Employer Shared Responsibility rule.

While multiemployer plans now respond to requests from contributing employers for information confirming that the plan provides affordable, minimum value coverage to

⁹ 79 Fed. Reg. at 8576.

participants who meet the plan's eligibility rules and offers coverage to dependent children, it is also important to note what information is *not* transmitted back to the contributing employers. Specifically, multiemployer plans do not, and in most cases cannot, transmit participant eligibility data to contributing employers (or to unions).

There has been some confusion about whether employers must include a code with respect to multiemployer plan coverage on Line 14 of Form 1095-C, based on whether or not an employee has met the plan's eligibility requirements. This confusion stems, in part, from the instruction for Line 14, which some read as requiring the employer to know whether a particular employee is or is not currently eligible to participate in the plan. As noted above, the multiemployer interim guidance does not make this distinction, which accords with how these plans operate. The instruction should be clarified to ensure that neither plans nor contributing employers are subject to reporting requirements that exceed the statutory requirements or required to provide information to which they do not have access.

In addition, we note that the plan's eligibility records are Protected Health Information under the Health Insurance Portability and Accountability Act (HIPAA) Privacy and Security Rules.¹⁰ Such information cannot be used or disclosed unless that disclosure is related to the health plan's treatment, payment, or health care operations purposes. It is not uncommon for contributing employers and unions to request that plans provide health eligibility and/or claims information with respect to particular individuals. The purposes for which this information is requested may vary from considering an FMLA claim to determining which participants have high-cost claims. Multiemployer plan administrators properly refuse requests for eligibility or claims information because the disclosure is not related to the plan's payment, treatment, or health care operations. The IRS should assure that the form and instructions do not require transmission of information that is unnecessary under Sections 4980H, 6056, or 6055 and would, inadvertently, result in a HIPAA privacy violation.

Forms 1095-B and 1094-B and Instructions

Multiemployer plans will use two forms for reporting self-insured minimum essential coverage: (1) Form 1095-B, the form plans provide to participants and file with the IRS and (2) Form 1094-B, the transmittal form plans file with the IRS.

In general, we believe the Instructions for Form 1095-B clearly explain what multiemployer plans must do, including providing information under Part IV about the specific months any individual was enrolled in the plan. Providing Social Security numbers for enrolled family members will be difficult for many multiemployer plans and we appreciate that the date

¹⁰ See 45 CFR Part 164.

of birth may be used after the plan makes reasonable, but unsuccessful, attempts to obtain Social Security numbers.

In their comments, the NCCMP notes the challenges multiemployer plans face in developing or obtaining software to complete the Forms and file them electronically with the IRS. We share those concerns and urge Treasury and IRS to finalize the Forms and Instructions in a timely manner so the necessary work may begin.

Form 1095-C and Instructions

While multiemployer plans will not complete Form 1095-C, the scope of information that contributing employers need to complete the Form is of interest and concern to both contributing employers and plans.

Our reading of the Forms 1094-C and 1095-C indicates they accurately implement the Section 4980H multiemployer interim guidance by allowing contributing employers to report a multiemployer plan is the relevant source for the employee's coverage information. The Instructions direct contributing employers to complete Form 1095-C using an indicator code that refers to the plan when the employee is covered by a collective bargaining agreement requiring contributions to a multiemployer plan.¹¹

However, there has been some confusion about whether more information is required, particularly whether contributing employers will need to know whether an employee has met the plan's participation requirements. This issue needs to be clarified. The Instructions for Form 1095-C direct employers to indicate the multiemployer interim guidance applies by inserting "2E" in Line 16 and they also tell large employers not to complete Line 14 when the multiemployer interim guidance applies.

We would like to point out that there is a misstatement of the multiemployer plan interim guidance in the Instructions for completing Line 14 of Form 1095-C:

Do not enter a code for any other type of health coverage the employer is treated as having offered under the dependent coverage transition relief, non-calendar year transition relief, or multiemployer arrangement interim guidance (if the employer is contributing on behalf of an employee but the employee is not eligible for coverage under the multiemployer plan) . . . (emphasis added)

¹¹ The preamble to the final ALE Information Reporting rule contemplated multiemployer plans would assist contributing employers by completing portions of the Form 1095-C. However, it does not appear such assistance will actually be necessary.

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The parenthetical indicates that the employee is not eligible for coverage under the multiemployer plan. Under the multiemployer interim guidance, employers are treated as offering coverage if they are required to contribute to a plan that offers coverage to individuals who satisfy the plan's eligibility conditions. The parenthetical is an incorrect statement, is inconsistent with the Section 4980H multiemployer interim guidance, and should be deleted.

We appreciate the opportunity to comment on the draft Forms and Instructions as they apply to multiemployer plans and contributing employers. Should you have any questions about these comments, please do not hesitate to contact us.

Sincerely,

/s/ Karin S. Feldman
Karin S. Feldman
Benefits and Social Insurance Policy Specialist