

NATIONAL COORDINATING COMMITTEE FOR MULTIEMPLOYER PLANS

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sent via email to Christie.A.Preston@irs.gov

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

Re: Proposed Information Collection; Comment Request; Forms 1094-B and 1095-B, OMB Number 1545-2252 (79 Fed Reg 52118, Sept. 2, 2014); and Forms 1094-C and 1095-C, OMB Number 1545-2251 (79 Fed Reg 52117, Sept. 2, 2014).

The National Coordinating Committee for Multiemployer Plans (NCCMP) appreciates the opportunity to submit comments on various draft informational returns and instructions relating to Sections 6055 and 6056 of the Internal Revenue Code, which were released August 28, 2014. The NCCMP has previously provided comments on proposed rules under Sections 6055 and 6056, which were published in the Federal Register on September 9, 2013 (comments were dated November 8, 2013).

Summary of Comments

We appreciate the efforts of the Treasury Department and Internal Revenue Service (IRS) to develop workable reporting rules that reflect the business operations of contributing employers and multiemployer plans. Specifically, we support the statement in the preamble to the final rule that the Treasury and the IRS do not have the statutory authority to transfer the IRC Section 6056 reporting obligations from the relevant employer to the multiemployer plan and agree that transferring the requirement to the plan would not be consistent with the statute.¹ Subject to one potentially significant clarification to the instructions for Form 1095-C (discussed below), we also support the current draft instructions and forms, which, as we read them, permit the multiemployer plan to fulfill its obligations with respect to IRC Section 6055 to report minimum essential coverage to the IRS and plan participants, and the contributing employers to fulfill their obligations under IRC Section 6056 to report information concerning full-time status and offers of coverage in a manner consistent with current plan and contributing employer operational procedures. However, there has been some confusion (including based on public comments from agency personnel), as to the specific information employers may need to obtain from multiemployer plans in order to complete Form 1095-C. We oppose any requirement for multiemployer plans to report eligibility information to contributing employers, as we believe that the existing forms (as we read them) provide all the information necessary under the statute to assure that the employers are meeting their obligations under the Affordable Care Act. We do not believe that such a requirement would be supported by the statute. Further, such a requirement would present unnecessary and unreasonably inefficient obligations for the plans and contributing employers.

¹ 79 Federal Register 13245 (March 10, 2014).

As we read Form 1095-C, the instructions for line 14 (“Offer of Coverage (“enter required code”)) correctly indicate that no code should be included by the employer if the employer is relying on the multiemployer interim guidance by entering the related code on line 16.

However, the wording of the instruction, particularly the parenthetical, is confusing. Thus, we recommend that the instruction read simply: “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.”

There is some confusion that the instructions require an employer to include a code for coverage based on whether the employee has actually completed the requirements for eligibility under the plan. Such an approach is inconsistent with the multiemployer plan relief and would require the sharing of eligibility and perhaps other information between the plan and contributing employers on an employee-by-employee basis. In most situations there is currently no mechanism in place for sharing this type of information in addition to a legal prohibition against doing so.

It would be helpful to clarify whether Form 1094-B and 1095-C can be prepared by third parties.

Finally, we note that significant lead time will be needed for software developers to develop the necessary programs to support completion of the forms. The lack of final forms and instructions impedes software development due to concerns that the forms will be changed considerably, requiring reworking and additional expense. Thus, the forms should be finalized quickly, with appropriate modifications, so that employers and plans will in fact be able to meet the filing deadlines. Given the lateness in the year, a further delay may be appropriate.

Detailed discussion of these comments is below, following brief background discussion of NCCMP and multiemployer plans.

Background on the NCCMP

The NCCMP is the only national organization devoted exclusively to protecting the interests of the over 20 million active and retired American workers and their families who rely on multiemployer plans for retirement, health and other benefits. The NCCMP’s purpose is to assure an environment in which multiemployer plans can continue their vital role in providing benefits to working men and women. The NCCMP is a nonprofit, non-partisan organization, with members, plans and contributing employers in every major segment of the multiemployer plan universe, including in the agricultural, airline, building and construction, entertainment, health care, hospitality, longshore, manufacturing, mining, retail, food (production, distribution and sales), office, building services and trucking industries.

Background on Multiemployer Plans

One of the crowning achievements of collective bargaining over the past 50 years is the creation of thousands of labor-management, multiemployer health and welfare trust funds that provide to covered workers and their dependents various benefit coverages, including medical, hospitalization, preventive and wellness care, prescription drugs, dental care, and vision care. Multiemployer plans provide health and welfare plan coverage to plan participants and their beneficiaries pursuant to the negotiated wages, hours, and other terms and conditions of

employment (including requiring contributions to be made to a multiemployer benefit trust) of a collective bargaining agreement between one or more unions and more than one employer.

Health and welfare trust funds cover workers in industries as diverse as building and construction, transportation, retail, food, clothing, textiles, service, mining, entertainment, hotel and restaurant, maritime, longshore, and manufacturing. But for these trust funds, millions more working families would be uninsured and at risk for financial ruin in the event of a serious illness. Indeed because most active participants in these plans are employed by small employers which fall below minimum thresholds for required coverage, many millions of workers in these funds would not be eligible for coverage even under the enhanced eligibility requirements mandated for employers by ACA. The transient, project-based, mobile and seasonal employment patterns that characterize many of these industries would prevent workers from obtaining health coverage absent a central, pooled fund through which portable coverage is provided to workers as they move from employer to employer.

COMMENTS

Our comments focus on the reporting obligation of the multiemployer plan under IRC Section 6055, and the relationship of the plan and the contributing employer with respect to the employer reporting obligations under IRC Section 6056. Understanding this relationship is important in understanding and implementing the statutory requirements. In terms of specific comments, first, we will address the forms that multiemployer plans will use as providers of self-insured minimum essential coverage (Forms 1095-B and 1094-B). Then we will offer comments on Form 1095-C, the form that large employers must use for reporting under Sections 6056 (and under Section 6055 if the employer sponsors a self-insured group health plan).

1. Relationship between Contributing Employers and Multiemployer Plans

Employers that contribute to a multiemployer plan are required to remit both work data and contributions to the plan administrator for each employee performing covered employment under the applicable collective bargaining agreement. The work data may be in the form of hours worked, days worked, or some other measurement in the collective bargaining agreement. Once the contributing employer remits its work data and contributions, it has satisfied its collective bargaining obligations.

The trustees of the multiemployer plan establish the eligibility rules for plan participants. The trustees are also responsible for enforcing the terms of the trust agreement and assuring that contributing employers properly remit work data and contributions. However, the trustees of the plan have no obligation to provide contributing employers with eligibility information as to when a participant and his or her dependents attain eligibility under the plan and there is no established legal requirement to do so. In fact, for many such covered employees, eligibility is established as a result of an accumulation of service with multiple employers rather than any single employer during the eligibility period. It is for this reason that under IRC Section 4980H the IRS and Treasury have established rules specific to applicable large employers contributing to multiemployer plans that describe how such employers meet their obligations under the ACA within the real-life multiemployer plan legal and operational structure.

2. Contributing Employers, Multiemployer Plans and IRC 4980H

The statutory provisions in IRC Section 4980H clearly establish that the employer is responsible for determining its full-time employees and paying any penalty that is due.

The final Employer Shared Responsibility Penalty² rule provides that a 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 multiemployer plan that provides coverage, to individuals who satisfy the plan's eligibility conditions, meeting the affordability and minimum value requirements and that offers coverage to those individuals' dependents.

We believe that the final rule and draft forms and instructions, as we read them, are consistent with both the multiemployer rule under Section 4980H, and Section 6055 and 6056 and implementing regulations. The Section 6055 forms require multiemployer plans to report the necessary information with respect to minimum essential coverage on Form 1095-B. In addition, large contributing employers are able to indicate on line 16 of their Section 6056 report (Form 1095-C) that contributions to a multiemployer plan are required, and then the plan's information (filed on the Form 1095-B) coordinates with the employer report. This approach reflects which party (the plan or the contributing employer) has the relevant information, provides a workable approach, and provides consistency with the application of the employer shared responsibility penalty (Code Section 4980H) with respect to employers who contribute to multiemployer plans.

It is important to state that the multiemployer guidance on Section 4980H has already had an immediate and positive effect. For well over a year, contributing employers have requested that multiemployer plans provide them with information confirming that the plan provides affordable, minimum value coverage to participants who meet the plan's eligibility rules and offers coverage to dependent children under 26. We expect that this process of providing information about the plan's benefits, coverage, and affordability will continue, as it has proven to be easily accomplished.

However, it is also important to note what information is *not* transmitted back to the contributing employers. Specifically, plan sponsors do not, and in most cases cannot, transmit participant eligibility data to contributing employers (or to unions). There has been some confusion as to whether employers need to 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 eligibility requirements under the plan. This confusion stems, in part, from the confusing instruction described further below, which some are reading as requiring the employer to know whether or not a particular employee is or is not currently eligible to participate in the plan. As noted above, the multiemployer transition rule does not make this distinction, which accords with operational reality. Clarification of this point is needed to ensure that neither plans nor contributing employers are subject to reporting requirements that exceed the statutory requirements or placed in a position that they need information that is currently not available.

² 79 Federal Register 8544 (February 12, 2014).

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.³ Such information cannot be used or disclosed unless it 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 a particular individual. The purposes for which this information is requested may vary. For example, an employer or union might want the information to process a disability or FMLA claim. In some cases, however, there may be other underlying purposes unknown to the plan, for example, who has 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 IRC 4980H, 6056, or 6055 and would, inadvertently, result in a HIPAA privacy violation.

3. Forms 1095-B and 1094-B and Instructions⁴

Multiemployer plans will use two forms for reporting self-insured minimum essential coverage:

- Form 1095-B – the form that plans furnish to participants and file with the IRS, and
- Form 1094-B – the transmittal form that plans file with the IRS, along with copies of the Forms 1095-B.

a. Form 1095-B and Instructions

In general, we believe that the instructions for Form 1095-B clearly explain what multiemployer plans need to do:

- Complete Part I (“Responsible Individual”) by providing identifying information regarding the primary individual (i.e., employee or retiree) covered under the plan.
 - Complete line 8 (“Origin of the Policy”) in Part I by putting the letter “E” in the box provided. The instructions explicitly state that letter “E” is reserved for multiemployer plans.⁵
- Disregard Part II (“Employer Sponsored Coverage”): This is for insurance companies providing coverage.
- Complete Part III (“Issuer or Other Coverage Provider”) by providing contact information for the plan, including the plan's employer identification number (EIN).

³ See 45 CFR Part 164.

⁴ The draft Form 1095-B is available at <http://www.irs.gov/pub/irs-dft/f1095b--dft.pdf>. The draft Form 1094-B is available at: <http://www.irs.gov/pub/irs-dft/f1094b--dft.pdf>. The draft instructions are available at: <http://www.irs.gov/pub/irs-dft/i109495b--dft.pdf>.

⁵ As an additional suggestion, because the references to “Policy Holder” (in the heading for Part I) and “Origin of the Policy” (in line 8) are confusing to participants in self-insured plans, the IRS may wish to consider omitting the reference to “Policy Holder” and replace “Origin of the Policy” with “Type of Coverage.”

- Complete Part IV (“Covered Individuals”) by providing information about the specific months that any individual was enrolled in the plan. Providing social security numbers for enrolled family members will be difficult for many plan sponsors. As a result, we appreciate that date of birth may be provided instead after the plan makes reasonable, but unsuccessful, attempts to collect the social security number.

While the information required to complete Part IV of the returns is fairly straight-forward, the IRS should not underestimate the significant challenges that multiemployer plans will face in developing or acquiring the software that will be necessary to populate the actual forms and then file them electronically with the IRS. The instructions (page 3) note that IRS Publication 5165, which will help software developers and transmitters develop transmission formats, business rules and validation procedures for electronic filing, remains in development.

Multiemployer plans or their third party administrators possess some type of enrollment information, but this is often stored in proprietary programs or databases created by IT staff or by external software vendors, and often these are customized for each plan. Unlike large employers, multiemployer plans do not use national vendors like ADP to process enrollment information. This means that each software developer that works with the multiemployer plan community will need to develop new programs to allow the plan’s existing (and likely customized) database of enrollment information to be translated into a format that can be used to populate the data fields in these returns. This will require significant lead time for the software developers, who may be reluctant to do this work (as plan sponsors will be reluctant to pay for it) until the returns and instructions for 2015 are released in final form.

b. 1094-B and Instructions

This form is merely a transmittal form, with the only substantive information being the count of Forms 1095-B being submitted. However, we would appreciate clarification about the role that third parties (such as third party administrators or tax return preparers) may play in completing these returns, including the transmittal form. The transmittal form refers to the “Filer’s Name” rather than the “Provider of Coverage” and requires the person signing the transmittal to attest that the transmittal and the accompanying Forms 1095-B are complete and correct. It would appear that this means the Forms 1095-B and the transmittal form can be completed by third parties, but this is not addressed in the instructions.

4. Form 1095-C and Instructions⁶

Multiemployer plans will not complete the Form 1095-C. However, the scope of information required for contributing employers to complete the form is of interest to NCCMP and both contributing employers and plans. As we read the forms, we believe that the forms accurately implement the Section 4980H rules by allowing contributing employers to report that a multiemployer plan is the relevant source for the participant’s coverage information. The instructions allow contributing employers to complete Form 1095-C using an indicator code which refers to the plan, when the employee is covered by a collective bargaining agreement that

⁶ The draft Form 1095-C is available at <http://www.irs.gov/pub/irs-dft/f1095c--dft.pdf>. The draft instructions are available at <http://www.irs.gov/pub/irs-dft/i109495c--dft.pdf>.

requires contributions to a multiemployer plan.⁷ As we read the draft form and instructions, they are consistent with both IRC Section 4980H and the IRC 6055 and 6056 requirements.

However, there has been some confusion as to whether more information is required from employers, in particular whether contributing employers will need to know whether a particular employee has met participation requirements under the plan. This issue needs to be clarified. The instructions for Form 1095-C (page 7) tell large employers to indicate that the multiemployer interim rule relief applies by inserting “2E” in line 16. The instructions (page 6) also tell large employers not to complete line 14 when the multiemployer interim relief rule applies. (It also follows that the employer can leave line 15 blank, as line 15 is only completed when certain entries are made in line 14.)

We would like to point out that there is a misstatement of the multiemployer interim relief rule in a parenthetical in the instructions for completing line 14 (underlined below in this excerpt from the instructions for line 14 on page 6):

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) . . .

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

Further, the parenthetical has generated confusion, and some are reading the parenthetical as requiring employers to include a coverage code on line 14 for those employees who have met the plan’s participation requirements, and leave it blank for others. This reading would require employers to provide information to the plan regarding full-time employees and employers would need eligibility information from the plan on an employee-by-employee basis. This type of information is simply not available under current operational structures (as there is no need for this information) and there is no structure for this type of information sharing. As noted above, providing this information may also be inconsistent with HIPAA privacy requirements. Clarification of this point is needed to ensure that neither plans nor contributing employers are subject to reporting requirements that exceed the statutory requirements and to ensure that contributing employers are not placed in a position of needing information that they do not have. As noted above, the Treasury does not have the statutory authority to place these reporting requirements on the plan.

⁷ The preamble to the final rule implementing Section 6056 (79 Fed. Reg. 13231, March 10, 2014) contemplated that a multiemployer plan would assist its contributing employers by completing portions of the Form 1095-C. However, it does not appear that such assistance will actually be necessary.

Conclusion

We greatly appreciate the opportunity to comment on the draft forms and instructions as they apply to multiemployer plans and contributing employers, and are more than happy to discuss any questions you may have regarding these comments.

Respectfully Submitted

A handwritten signature in black ink, appearing to read "Randy G. DeFrehn". The signature is fluid and cursive, with the first name "Randy" being the most prominent.

Randy G. DeFrehn
Executive Director

cc: Phyllis C. Borzi, Assistant Secretary
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