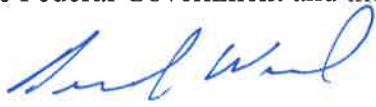




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ALL AGENCY MEMORANDUM NUMBER 220

TO: All Contracting Agencies of the Federal Government and the District of Columbia

FROM: Dr. David Weil, Administrator 

SUBJECT: Certain Provisions of the Affordable Care Act and Compliance With the Fringe Benefit Requirements of the Service Contract Act, Davis-Bacon Act, and Davis-Bacon Related Acts

The Affordable Care Act (“ACA”), which comprises the Patient Protection and Affordable Care Act (Pub. L. 111–148) and the Health Care and Education Reconciliation Act (Pub. L. 111–152), added the employer shared responsibility provisions in section 4980H to the Internal Revenue Code (“Code”). Effective January 1, 2015,¹ the employer shared responsibility provisions generally provide that certain employers must either offer their full-time employees (and their dependents²) health coverage that is affordable and that provides minimum value, or alternatively, make a payment to the Internal Revenue Service (“IRS”) if they do not offer this coverage and at least one full-time employee purchases health insurance on an Affordable Insurance Exchange³ (“Exchange”) and receives the premium tax credit.

The purpose of this All Agency Memorandum (“AAM”) is to provide guidance to governmental and other entities on the interaction of the ACA, in particular the employer shared responsibility provisions and certain rating rules, and the fringe benefit requirements of the McNamara-O’Hara Service Contract Act, Davis-Bacon Act, and Davis-Bacon Related Acts. These statutes require covered employers to pay prevailing wages, including, where applicable, a designated amount of fringe benefits, to covered employees.

1. Introduction

A. The McNamara-O’Hara Service Contract Act, Davis-Bacon Act, and Davis-Bacon Related Acts

¹ Section 1513(d) of Pub. L. 111–148 provides that section 4980H applies to months beginning after December 31, 2013; however, Notice 2013–45 (2013–31 I.R.B. 116), issued on July 9, 2013, provided transition relief for 2014 with respect to section 4980H.

² For purposes of the employer shared responsibility provisions, a dependent is an employee’s child (including a child who has been legally adopted or placed for adoption) who has not reached the age of 26. Spouses are not considered dependents for this purpose, and neither are stepchildren or foster children. For the full definition of dependent, see 26 C.F.R. § 54.4980H-1(a)(12).

³ An Exchange, also referred to as a Health Insurance Marketplace, is a resource where individuals and families, as well as small businesses, can choose a health care plan and enroll in coverage. Some states operate their own Exchanges; in others, the Exchange is run by the federal government.

The McNamara-O’Hara Service Contract Act (“SCA”)⁴ and Davis-Bacon Act (“DBA”)⁵ generally require that workers employed on federal service contracts over \$2,500, and construction contracts over \$2,000, respectively, be paid prevailing wages and fringe benefits. Under numerous laws known as the Davis-Bacon Related Acts (“Related Acts”), the DBA’s requirements also apply to construction projects that are assisted by Federal agencies through grants, loans, loan guarantees, insurance and other methods.⁶

Under the SCA, covered workers must receive both minimum monetary wages and fringe benefits. For some SCA contracts, the required wages and fringe benefits are those that were contained in a predecessor contract’s collective bargaining agreement. For most SCA contracts, however, wages and fringe benefits are set forth by the Department of Labor’s Wage and Hour Division (“WHD”) in area-wide wage determinations. The required amount of health and welfare fringe benefits (which may include various types of benefits, including health coverage) is based on data from the Bureau of Labor Statistics Employment Cost Index.⁷ Currently, the required SCA health and welfare amount is \$4.27 per hour.⁸ This amount can be paid in benefits, the cash equivalent of benefits, or some combination thereof. In contrast, the SCA monetary wage, which is calculated in accordance with locally prevailing wages, must be paid in cash and cannot be satisfied by fringe benefits.

The DBA and the Related Acts (collectively “DBRAs”) require that covered workers receive a prevailing wage, which comprises both a basic hourly rate of pay and any fringe benefits found to be prevailing.⁹ WHD makes DBRA wage determinations, including fringe benefit determinations, based on locally prevailing rates. Under both the DBRAs and SCA, an employer can satisfy its fringe benefit obligations by paying the cash equivalent of the specified fringe benefit amount. Under the DBRAs – but not under the SCA – a covered employer can also satisfy its basic hourly rate obligation by paying fringe benefits.¹⁰ Health coverage is one of the types of fringe benefits that may be provided to satisfy SCA and DBRA requirements.

B. The Employer Shared Responsibility Provisions

The employer shared responsibility provisions apply to applicable large employers (“ALEs”), which are employers with an average of at least 50 full-time employees (including full-time equivalent employees) during the previous year.¹¹ In general, under the employer

⁴ 41 U.S.C. Chapter 67.

⁵ 40 U.S.C. Chapter 31, Subchapter IV.

⁶ See 29 C.F.R. § 5.1(a) (listing many of the Related Acts).

⁷ See 29 C.F.R. § 4.52(a).

⁸ See Dep’t of Labor, Wage and Hour Div., All Agency Memorandum No. 217, June 30, 2015, *available at* http://www.dol.gov/whd/govcontracts/sca/sf98/memo_217.pdf.

⁹ Unlike the SCA, which contains a separate fringe benefits requirement for all covered workers, DBRA wage determinations do not necessarily include an amount for fringe benefits if fringe benefits are not found to be prevailing for the particular occupation in the locality.

¹⁰ Employers covered by the DBRAs who use fringe benefits to satisfy some of their basic hourly wage obligations must still comply with applicable laws that require the payment of minimum wages in cash. See *infra* at 8-9.

¹¹ Note that the Surface Transportation and Veterans Health Care Choice Improvement Act of 2015 amended section 4980H to provide that, solely for purposes of determining whether an employer is an ALE, an individual is not taken

shared responsibility provisions, an ALE must either offer its full-time employees (and their dependents) health coverage¹² that is affordable and provides minimum value, or, alternatively, make a payment to the IRS if it does not offer this coverage and at least one full-time employee purchases health insurance on an Exchange and receives the premium tax credit.¹³ For purposes of the employer shared responsibility provisions, a full-time employee is, for a calendar month, an employee employed on average at least 30 hours of service per week, or 130 hours of service per month. An ALE does not need to offer coverage to part-time employees in order to avoid an employer shared responsibility payment.

There are two different types of employer shared responsibility payments. Depending on an employer's decisions about offering health coverage to its full-time employees (and their dependents), an employer may not be subject to any employer shared responsibility payment, or it may be subject to one of the two potential payments; it will not be subject to both.

- An ALE will owe the first type of employer shared responsibility payment if it does not offer minimum essential coverage to at least 95 percent of its full-time employees (and their dependents), and at least one full-time employee receives the premium tax credit for purchasing coverage through the Exchange. If an ALE is subject to this first type of employer shared responsibility payment, the annual payment will be \$2,000 (adjusted for inflation) for each full-time employee, after excluding the first 30 full-time employees from the calculation.
- Even if an ALE is not subject to the first type of employer shared responsibility payment, it may owe the second type of employer shared responsibility payment for any full-time employee who receives the premium tax credit for purchasing coverage through the Exchange. Generally, an employee can receive the premium tax credit only if the employer does not offer coverage to the employee or because coverage that is offered is not affordable, or does not provide minimum value. If an ALE owes this second type of employer shared responsibility payment, the annual payment will be \$3,000 (adjusted for inflation) for each full-time employee who receives the premium tax credit (except that the amount of this payment can never exceed the potential amount of the first type of employer shared responsibility payment).

into account if the individual has health coverage under TRICARE or the Veterans Administration. See Pub. L. 114-41, § 4007; 26 U.S.C. § 4980H(c)(2)(F).

¹² "Coverage" in this sense is coverage under an eligible employer-sponsored plan, within the meaning of the ACA. See 26 U.S.C. § 5000A(f)(1)(B); Shared Responsibility for Employers Regarding Health Coverage; Final Rule, 79 Fed. Reg. 8544, 8545 (Feb. 12, 2014) ("Employer Shared Responsibility Rule"), available at <https://www.federalregister.gov/articles/2014/02/12/2014-03082/shared-responsibility-for-employers-regarding-health-coverage>.

¹³ The Department of the Treasury has promulgated final regulations on the employer shared responsibility provisions. The final regulations explain which employers are subject to these provisions and describe the circumstances under which an employer may be subject to an employer shared responsibility payment. The final regulations also define various terms, including "affordability" and "minimum value." When the terms affordability and minimum value are used in this AAM, they have the meanings set out in the final regulations. See Employer Shared Responsibility Rule, *supra* note 12. The preamble to the final regulations also sets forth various types of transition relief available for 2015.

The employer shared responsibility provisions were first effective on January 1, 2014. Broad transition relief was provided for 2014, and additional transition relief from certain requirements was provided for 2015. Under this relief, an ALE with fewer than 100 full-time employees (including full-time-equivalent employees) in 2014 is not subject to the employer shared responsibility provisions for 2015, provided certain conditions are met regarding the employer's maintenance of its workforce and pre-existing health coverage. For an employer with a non-calendar year plan year, this relief extends to the months in 2016 that are part of the 2015 plan year.¹⁴

The guidance below is intended to address certain issues and questions regarding the interaction of the ACA and the fringe benefit requirements of the SCA and DBRAs.

2. Basic Governing Principle.

The ACA, SCA, and DBRAs are separate, independent laws. Employers subject to the ACA and the SCA or DBRAs are required to comply with each. The ACA does not alter the statutory and regulatory requirements of the SCA and DBRAs.

Thus, for example, an employer covered by the SCA or DBRAs that offers a health plan in order to not be subject to an employer shared responsibility payment must also follow the applicable SCA or DBRA regulations that govern the extent to which the employer may credit the cost of the plan toward its prevailing wage or fringe benefit obligations, how the hourly cost is calculated, the frequency of contributions, and other relevant requirements. Conversely, employers that seek to fulfill their SCA or DBRA obligations by providing health coverage for their employees are subject to the independent provisions of the ACA, as applicable, such as the employer shared responsibility provisions for employers that are ALEs.

The guidance below adheres to this general principle. Employers are cautioned to be mindful of the independent requirements of these and other applicable statutes, and not to assume that compliance with one statute constitutes compliance with another.

3. Whether contributions toward health coverage by employers subject to the employer shared responsibility provisions can be credited toward the payment of fringe benefits under the SCA and DBRAs.

While numerous types of benefits programs will qualify as fringe benefits under the SCA or DBRAs, employers may not receive credit toward their SCA or DBRA obligations for any benefits that they are already required to provide under any Federal, state, or local law.¹⁵ Thus, for example, employer contributions to Social Security, which are required under federal law, and other legally mandated obligations such as workers' compensation may not be credited toward the payment of fringe benefits under the SCA or DBRAs.

¹⁴ See Employer Shared Responsibility Rule, *supra* note 12, at 8574.

¹⁵ See 41 U.S.C. § 6703(2); 29 C.F.R. § 4.171(c) (SCA); 40 U.S.C. § 3141(2)(B); 29 C.F.R. § 5.29(a) (DBRAs).

As noted above, in general, under the employer shared responsibility provisions, an ALE must either offer its full-time employees (and their dependents) health coverage that is affordable and provides minimum value, or, alternatively, make a payment to the IRS if the employer does not offer this coverage and at least one full-time employee purchases health insurance on an Exchange and receives the premium tax credit. Interested parties have asked whether health coverage provided by an ALE would be considered a benefit required by law and thus not creditable toward the employer's obligations under the SCA or DBRAs.

WHD has concluded that health benefits provided by employers subject to the employer shared responsibility provisions are not benefits required by law within the meaning of the SCA and DBRAs. Therefore, all employers, ALEs and non-ALEs, may continue to take SCA or DBRA credit for contributions to bona fide health plans as they have done in the past. Under the employer shared responsibility provisions, no employer is required to purchase or cover the cost of health coverage for its employees. Rather, ALEs have a choice of either offering full-time employees (and their dependents) health coverage that is affordable and provides minimum value or, alternatively, not offering such coverage and making a payment to the IRS if at least one full-time employee purchases health insurance on an Exchange and receives the premium tax credit.¹⁶ Because no employer is required by the employer shared responsibility provisions to purchase or cover the cost of health coverage for its employees, health coverage purchased or paid for by ALEs is not a benefit required by law, and as such, WHD will permit ALEs to credit their contributions to bona fide health coverage plans toward the satisfaction of SCA or DBRA fringe benefit obligations.

4. Whether employers' payments of employer shared responsibility payments to the IRS may be credited toward DBRA and SCA obligations.

As noted above, an ALE may choose to either offer affordable health coverage that provides minimum value to its full-time employees (and their dependents) or potentially owe an employer shared responsibility payment to the IRS.¹⁷

Employers that are liable for the employer shared responsibility payment to the IRS may not credit the cost of this payment toward SCA or DBRA obligations. While the SCA and DBRAs do not define the term "fringe benefits" or provide exhaustive lists of such benefits, it is clear from the examples of benefits listed in the legislation and regulations – such as medical care, pensions, life insurance, and health insurance¹⁸ – that a payment to the IRS does not qualify because, unlike these benefits, it does not confer benefits specifically on the employer's workers. Moreover, under the SCA, fringe benefits must either be provided in cash, through a plan whose "primary purpose" is "to provide systematically for the payment of benefits to employees on

¹⁶ See 26 U.S.C. § 4980H(a)-(b) (stating that "[i]f" an ALE does not offer qualifying coverage and an employee purchases a plan on an Exchange and qualifies for the premium tax credit or cost-sharing reduction, "then" the employer must make an assessable payment to the Treasury); Employer Shared Responsibility Rule, *supra* note 12, at 8544; *Liberty Univ. v. Lew*, 733 F.3d 72, 98 (4th Cir. 2013) (noting that the employer shared responsibility provision "leaves large employers with a choice for complying with the law – provide adequate, affordable health coverage to employees or pay a tax") (citing 26 U.S.C. § 4980H(a)-(b)).

¹⁷ See discussion *supra* at 2-3; 26 U.S.C. § 4980H(a)-(b); Employer Shared Responsibility Rule, *supra* note 12.

¹⁸ See 41 U.S.C. § 6703(2); 29 C.F.R. § 4.162(a) (SCA); 40 U.S.C. 3141(2)(B); 29 C.F.R. § 5.29(a) (DBRAs).

account of death, disability, advanced age, retirement, illness, medical expenses, hospitalization, supplemental unemployment benefits, and the like,” or, under some circumstances, through an enforceable commitment by the employer to provide such benefits to its employees.¹⁹ A payment to the IRS meets none of these requirements. Under the DBRAs, all covered workers must be paid in a combination of wages and/or bona fide fringe benefits, or cash equivalents thereof,²⁰ and the Department has consistently held that fringe benefit contributions under the DBRAs generally must vest to the exclusive benefit of the employee whose work led to the contributions – that is, they must provide a direct, specific benefit to the employee in question.²¹ A payment of the employer shared responsibility payment to the IRS does not provide such a direct, specific benefit. Thus, such a payment cannot be credited toward SCA or DBRA requirements.

5. Whether employees who decline an employer’s offer of employer health coverage must still be furnished fringe benefits under the SCA or DBRAs.

An employer covered by the SCA or DBRAs may choose the manner in which it satisfies its fringe benefit obligations, and unless it has agreed otherwise, such as through a collective bargaining agreement, it need not provide employees with a choice of accepting or declining the benefits chosen by the employer. Thus, for example, if an employer covered by the SCA or DBRAs chooses to provide all employees with fringe benefits in the form of health coverage, it may do so even if some or all of its employees might prefer to receive the fringe benefit payment in cash or some other fringe benefit. Under the SCA and DBRAs, because it is the contractor’s responsibility to satisfy the fringe benefit obligations set forth in the applicable wage determination, the contractor may choose the fringe benefits to be provided, and a contractor need not obtain an employee’s concurrence before contributing to a fringe benefit plan, such as a health plan, on the employee’s behalf.²²

Under the ACA employer shared responsibility provisions, an ALE likewise need not provide its employees with an opportunity to decline health coverage if the coverage the ALE offers provides minimum value and costs no more than 9.5 percent (as adjusted annually) of the federal poverty line (determined on a monthly basis). However, if the coverage offered by an ALE to a full-time employee does not provide minimum value or costs the employee more than

¹⁹ See 29 C.F.R. §§ 4.170–171.

²⁰ See 29 C.F.R. §§ 5.5(a)(1); 5.31.

²¹ See, e.g., *In Re Bldg. & Constr. Trades Unions Job Targeting Programs*, WAB Case No. 90-02, 1991 WL 494718, at *6 (W.A.B. June 13, 1991).

²² See U.S. Dep’t of Labor, Wage and Hour Div., Field Operations Handbook (“FOH”), ch. 14j00(d), available at http://www.dol.gov/whd/FOH/FOH_Ch14.pdf; FOH ch. 15f11(f), available at http://www.dol.gov/whd/FOH/FOH_Ch15.pdf. Under certain limited circumstances, health and welfare plans may contain eligibility exclusions for certain employees; for example, a plan may exclude temporary or part-time employees, or may prohibit “double coverage” of employees who already receive benefits through another employer’s plan or spousal coverage. While, as noted above, SCA or DBRA employers normally may choose the fringe benefits to be provided, a contractor may not satisfy its fringe benefit obligations as to such excluded employees by making contributions to fringe benefit plans in which they are not eligible to participate. Rather, the contractor must provide such employees with other fringe benefits or a cash equivalent payment. See 29 C.F.R. 4.175(d), FOH chs. 14j06(d), 15f13.

the above amount, then an ALE is not treated as having made an offer of coverage unless the employee has an effective opportunity to decline to enroll.²³

Regardless of whether the employer is an ALE, in those instances where employers covered by the SCA or DBRAs provide employees a choice whether to accept or decline health coverage, if some employees decline and if the employer therefore does not purchase or cover the cost of health coverage for those employees, the employer must still satisfy its SCA or DBRA obligations through some other means, either in cash or by providing some other bona fide fringe benefit. The DBRAs and SCA require that wages and fringe benefits be furnished to employees; merely offering benefits, but ultimately not providing them, does not suffice. If employees desire cash payments or benefits other than those chosen by the contractor, under the SCA and DBRAs, that would be a matter for discussion and resolution between the employees or their authorized representative and the employer. The Department of the Treasury and the Internal Revenue Service have recently issued additional guidance regarding questions that have arisen regarding the treatment under various ACA provisions, including the employer shared responsibility provisions, of amounts that may be used either for employer provided health coverage, or for non-health benefits (or received in cash) in this context.²⁴

6. Whether offering a health plan that constitutes a bona fide fringe benefit plan under the SCA and DBRAs will result in an ALE not owing an employer shared responsibility payment.

As noted above, the ACA's employer shared responsibility provisions, the SCA, and the DBRAs are separate laws which contain different, independent rules. As such, the fact that a health plan is a "bona fide" fringe benefit plan under the SCA and DBRAs does not guarantee that by offering such a plan the employer will avoid an employer shared responsibility payment, if applicable.

Under the SCA, a fringe benefit plan is "bona fide" if it has a number of basic elements. It must be specified in writing and communicated in writing to employees; contributions must be made pursuant to a plan, fund or program; its primary purpose must be to systematically provide for benefits payments to employees; it must contain a definite formula for determining contributions and benefits; and contributions must be made irrevocably to a trustee or third party with fiduciary responsibilities.²⁵ DBRA regulations do not list requirements of a bona fide plan, but indicate that benefits funded under a trust or insurance program would typically be bona fide, and that the "bona fide" requirement excludes fringe benefits that are "illusory or not genuine."²⁶

²³ 26 C.F.R. §§ 54.4980H-4(b); -5(b).

²⁴ See Minimum Essential Coverage and Other Rules Regarding the Shared Responsibility Payment for Individuals, Final Rule, 79 Fed. Reg. 70464 (Nov. 26, 2014); Minimum Value of Eligible Employer-Sponsored Plans and Other Rules Regarding the Health Insurance Premium Tax Credit, 80 Fed. Reg. 78971 (Dec. 18, 2015); Notice 2015-87, 2015-52 I.R.B. 889.

²⁵ Additionally, benefit plans or trusts of the type listed in 26 U.S.C. § 401(a) that are disapproved by the IRS or that do not meet the requirements of ERISA are not "bona fide." For a list of the requirements of "bona fide" plans under the SCA, see 29 C.F.R. § 4.171(a).

²⁶ See 29 C.F.R. § 5.29(d).

Because these basic requirements will typically apply to any legitimate health plan, WHD anticipates that eligible employer-sponsored plans, as defined under the ACA, will be bona fide under the SCA or DBRAs. However, SCA and DBRA employers who are ALEs that wish to avoid being liable for an employer shared responsibility payment must separately determine whether the offer of their bona fide health plans is sufficient to avoid either or both of the potential employer shared responsibility payments, including whether the coverage is affordable and provides minimum value within the meaning of the employer shared responsibility provisions.

Employers with questions about whether a plan is bona fide should direct any inquiries to the Department of Labor's Wage and Hour Division. For more information about the employer shared responsibility provisions, an employer should review the information at <http://www.irs.gov/Affordable-Care-Act/Employers/Employer-Shared-Responsibility-Provisions>.

7. Crediting the Cost of Health Coverage Toward SCA and DBRA Obligations.

When taking credit under the SCA or DBRAs for the cost of health coverage, SCA and DBRA-covered employers should be mindful of the differences between the SCA's and DBRAs' treatment of fringe benefit obligations.

As noted above, under the DBRAs, the basic hourly wage and fringe benefit components of a wage determination are interchangeable.²⁷ This is because the statutory language of the DBA defines "wages" to include both the basic hourly rate and fringe benefits.²⁸ Thus, a DBRA employer that purchases health insurance for its employees may credit the cost of that insurance toward either of those obligations, or a combination of the two, and it is permissible for a contractor to offset its hourly wage obligation by furnishing fringe benefits. This is the case even if the cost of fringe benefits exceeds the fringe benefit amount listed in the DBRA wage determination, or even if the wage determination lists no fringe benefits at all.²⁹ For example, if a DBRA wage determination includes a basic hourly rate of \$15.00 and a fringe benefit amount of \$2.00 per hour, and the cost of the health insurance plan selected by the employer is \$3.00 per hour, the contractor may satisfy its DBRA obligations by paying \$14.00 in cash and spending \$3.00 on the health coverage plan.

Employers who, as in the above example, offset a portion of the DBRA hourly wage by furnishing fringe benefits must, however, ensure that the amount of the basic hourly wage paid in cash is not lower than applicable minimum wage rates. The Fair Labor Standards Act ("FLSA") requires that covered employees be paid a minimum wage of \$7.25 per hour, and DBA and SCA contracts resulting from solicitations issued on or after January 1, 2015, or awarded outside the

²⁷ See 29 C.F.R. § 5.31(b)(4); U.S. Dep't of Labor, Wage & Hour Div., *Field Operations Handbook*, ch. 15f07(a), available at http://www.dol.gov/whd/FOH/FOH_Ch15.pdf.

²⁸ See 40 U.S.C. § 3141(2).

²⁹ See U.S. Dep't of Labor, Wage & Hour Div., *Field Operations Handbook*, ch. 15f11(e), available at http://www.dol.gov/whd/FOH/FOH_Ch15.pdf; *In Re Collinson Constr. Co.*, WAB Case No. 76-09 (W.A.B. Apr. 20, 1977), 1977 WL 24826.

solicitation process on or after January 1, 2015, are subject to Executive Order 13658, Establishing a Minimum Wage for Contractors (Feb. 12, 2014), which establishes a minimum wage of \$10.10 per hour, subject to annual increases (including an increase to \$10.15 per hour effective January 1, 2016).³⁰ These minimum wage obligations may not be satisfied using fringe benefits.³¹ Thus, in the above example of a DBRA wage worker whose wage determination includes \$15.00 in basic hourly wages and \$2.00 in fringe benefits, assuming that the employer pays the worker exactly the \$17.00 total from the wage determination, it can pay no more than \$9.75 (\$17.00 - \$7.25) total in fringe benefits in order to remain compliant with the FLSA minimum wage, and if the contract is covered by Executive Order 13658, it can pay no more than \$6.85 (\$17.00 - \$10.15) in fringe benefits to remain compliant with the Executive Order.

In contrast, under the SCA, fringe benefits may not be used to offset an employer's monetary wage obligations under any circumstances because the language of the SCA treats wages and fringe benefits as separate, independent requirements.³² Thus, any costs of health coverage (or costs for additional optional coverage) that exceed the health and welfare amount listed in an SCA wage determination cannot be credited toward the employer's SCA independent monetary wage obligation. The only exception is if the employer obtains an employee's consent for payroll deductions from the employee's monetary wage; such consent can only occur through either the employee's authorization or pursuant to the terms of a collective bargaining agreement.³³

8. Per-Member Rating and SCA and DBRA Requirements.

Under the ACA and its implementing regulations, "composite rating" – a practice in which insurers use the rating characteristics of a group as a whole to determine an average premium rate per employee – generally is no longer permitted in the small group market (employers with 1-50 employees, subject to state flexibility to expand to include employers with 1-100 employees). Instead, insurers offering non-grandfathered coverage in the small group market must use "per-member rating," under which premium rates are calculated individually for each employee based on as many as four permissible factors: family size, geography, age, and tobacco use.³⁴ However, after using per-member rating to calculate the total group premium,

³⁰ Executive Order 13658 does not apply to workers under the Related Acts. See Establishing a Minimum Wage for Contractors, 79 Fed. Reg. 60634, 60650 (Oct. 7, 2014), available at <http://www.dol.gov/whd/flsa/eo13658>.

³¹ See 29 C.F.R. § 531.27(a) (FLSA); Establishing a Minimum Wage for Contractors, 79 Fed. Reg. at 60725; 29 C.F.R. § 10.22(b).

³² See 41 U.S.C. § 6703(1–2); 29 C.F.R. § 4.170(a); U.S. Dep't of Labor, Wage and Hour Div., Field Operations Handbook, ch. 14j02, available at http://www.dol.gov/whd/FOH/FOH_Ch14.pdf.

³³ See 29 C.F.R. § 4.168(a). An employee typically provides such consent by signing a form that authorizes the deduction.

³⁴ See 45 C.F.R. § 147.102(c)(1); (c)(3)(i). States that do not permit rating based on age and tobacco use are permitted to use uniform family tiers and corresponding multipliers in lieu of per-member rating. See 45 C.F.R. § 147.102(c)(2). Currently, the only such states are New York and Vermont. See Ctr. for Consumer Info & Ins. Oversight, Market Rating Reforms: State Specific Rating Variations, <http://www.cms.gov/CCIIO/Programs-and-Initiatives/Health-Insurance-Market-Reforms/state-rating.html> (last updated Feb. 26, 2016).

insurers may then charge premiums based on average employee premium amounts (“composite premiums”), provided that the average is derived using the total of all per-member premiums.³⁵

Under the DBRAs and, in most cases, the SCA, fringe benefit contribution amounts must reflect the actual cost to the employer of the benefit(s) for the employee on whose behalf the contribution is made. The DBRAs require that employers make payments or incur costs in the amount specified by the applicable wage determination with respect to each individual employee. Thus, the amount contributed for each employee must be determined, and credit taken, separately toward the prevailing wage requirement for each covered worker; an employer may not take credit based on the average premium paid or average contribution made per employee.³⁶ Likewise, most SCA contracts are subject to a requirement that fringe benefit contributions must be tracked on an individual basis.³⁷

As a result of these requirements, an employer that contributes to a health insurance plan to satisfy its obligations under the SCA or DBRAs may take credit for no more than the premiums charged to the employer by the insurer for each employee at issue. For example, if an employer in the small group market chooses an insurance plan that does not offer composite premiums, but only offers individualized premiums on a member-by-member basis, then the amount of permissible SCA or DBRA credit will necessarily vary from employee to employee. Thus, if an employer in the small group market employs four workers, one age 25, two age 35, and one age 45, and the hourly premiums charged by the insurer for these employees are \$2.00, \$2.50, \$2.50, and \$3.00, respectively, the employer may take up to \$2.00 of SCA or DBRA credit for the 25-year-old employee, up to \$2.50 credit for each of the two 35-year-old employees, and up to \$3.00 credit for the 45-year-old employee.

It is anticipated, however, that many insurers will, as permitted by the regulations or as required by applicable state law, offer plans that charge composite, or average, premiums. In the above example, an insurer charging composite premiums would first calculate the per-member

³⁵ In other words, the sum of all of the premiums based on average employee premiums must be equivalent to the sum of all of the per-member premiums, as calculated at the time of applicable enrollment at the beginning of the plan year. See 45 C.F.R. § 147.102(c)(3)(ii); Patient Protection and Affordable Care Act; HHS Notice of Benefit and Payment Parameters for 2015; Final Rule, 79 Fed. Reg. 13744, 13749 (Mar. 11, 2014) (“HHS 2015 Final Rule”), available at <https://www.federalregister.gov/articles/2014/03/11/2014-05052/patient-protection-and-affordable-care-act-hhs-notice-of-benefit-and-payment-parameters-for-2015>. Additionally, for plan years beginning on or after January 1, 2015, certain other requirements must be met. See *infra* at 11. In states that use uniform family tiers and corresponding multipliers instead of per-member rating, see *supra* n.34, the sum of all of the composite premiums must be equal to the sum of all premiums derived from family-tier rating. See 45 C.F.R. § 147.102(c)(3)(ii); HHS 2015 Final Rule, 79 Fed. Reg. at 13749 n.11.

³⁶ See 29 C.F.R. § 5.5(a)(3)(ii)(B)(3); U.S. Dep’t of Labor, Wage and Hour Division, Prevailing Wage Resource Book, Tab 9, at 18, <http://www.dol.gov/whd/recovery/pwrb/Tab9.pdf>.

³⁷ This “fixed cost” wage determination applicable to most SCA contracts is detailed at 29 C.F.R. § 4.175(a). A small number of SCA contracts allow the employer to satisfy its obligations as long as the employer’s average contribution across all service employees employed on the contract is at least the rate specified in the SCA wage determination. This alternative “average cost” requirement is detailed at 29 C.F.R. § 4.175(b). Such wage determinations apply only where an average cost determination applied to the preceding contract with the same agency for substantially the same services at the same location; as such, they are few in number. The discussion in this section pertains primarily to the more common “fixed cost” wage determinations, since employers subject to “average cost” wage determinations have considerably more flexibility in allocating SCA credit.

rates for each worker (\$2.00, \$2.50, \$2.50, and \$3.00), and would then divide the sum ($\$2.00 + \$2.50 + \$2.50 + \$3.00 = \$10.00$) equally among all employees to yield an average, or composite, premium of \$2.50 ($\$10 \div 4$), which would be the amount charged to the employer for each employee. In such a case, the employer would take the composite amount of SCA or DBRA credit for each employee, because even though the composite premium is derived from different per-member rates, it reflects the cost that the insurer is charging the employer to insure each employee.

Even for insurers and employers using composite premiums, however, premium amounts – and, therefore, the permissible amount of SCA or DBRA credit – may vary among employees. Specifically, for plan years beginning on or after January 1, 2015, insurers offering non-grandfathered plans in the small group market that charge composite premiums must divide covered individuals into two groups, or “tiers,” for compositing purposes – individuals age 21 and over and individuals under age 21 – unless a state has established, and the Centers for Medicare & Medicaid Services (“CMS”) has approved, an alternate compositing method.³⁸ Thus, in the above example, assuming that the employer also employs individuals under age 21 and that the average premium for the employees under age 21 is \$1.50 while the average premium for individuals age 21 and over is \$2.50, the employer may take \$1.50 of SCA or DBRA credit for each employee under age 21, and \$2.50 credit for each employee age 21 or over.³⁹ Similarly, for plan years beginning on after January 1, 2015, HHS’s regulations prohibit composite premiums for non-grandfathered plans in the small group market from incorporating tobacco use; rather, if an insurer uses tobacco use as a rating characteristic, the tobacco rating must be applied on a per-member basis *after* the composite premium is calculated and as otherwise permitted by the regulations.⁴⁰ As such, for an employer whose plan uses tobacco as a rating characteristic, the amount of permissible SCA or DBRA credit per employee will vary based on tobacco use even if the insurer charges composite premiums. Thus, in the above example, if the 25-year-old employee uses tobacco and the insurer applies a 20 percent surcharge for a 25-year-old tobacco user, the premium charged for that employee – and the permissible amount of SCA or DBRA credit – would be \$2.90 (the composite premium of \$2.50 plus \$0.40, or 20 percent times the per-member premium of \$2.00 for a 25-year-old worker), while the composite premiums for the other three employees 21 and over would remain at \$2.50.

The general principle applicable to all employers subject to the SCA and DBRAs is that employers may take credit only for the amount of the premium that the insurance issuer charges the employer for each employee. While many employees may be charged identical amounts due to composite premiums (or composite rating in the large group market, which is not specifically addressed in this memorandum), under many circumstances the premiums charged for different

³⁸ See 45 C.F.R. § 147.102(c)(3)(iii)(B). To date, twenty-four states have obtained approval for alternate composite premium methods. See Ctr. for Consumer Info & Ins. Oversight, *supra* note 34.

³⁹ In other words, the employer may not combine the premiums of the employees 21 and over with those of employees under 21 together to take an average amount of SCA or DBRA credit across all employees. If a state has adopted an alternate, CMS-approved composite premium method, *see supra* n.38, employers would take credit that reflects the amounts charged by insurers according to the state-specific rules for compositing rather than this two-tiered approach.

⁴⁰ See 45 C.F.R. § 147.102(c)(3)(iii)(C). Not all insurers use tobacco as a rating characteristic, and some states restrict or prohibit this practice.

employees will vary. Employers should ensure that the amount of SCA or DBRA credit taken for each employee does not exceed the cost of that employee's insurance as charged by the issuer.⁴¹

Additional Information

This AAM is general guidance on compliance with the SCA and DBRAs as it relates to certain provisions of the ACA. It is not intended to address every situation in which the ACA and the DBRAs or the SCA may apply to an employer.

The WHD website has information, memoranda, and links that may be useful to federal and other government agencies, recipients of federal assistance, contracting entities, contractors, employees and others with an interest in the application of SCA and DBRAs prevailing wage, fringe benefit and labor standards requirements, located at <http://www.dol.gov/whd/govcontracts>. Additional information on the SCA is available at <http://www.dol.gov/whd/govcontracts/sca.htm>. Additional information on the DBA and DBRAs is available at <http://www.dol.gov/whd/govcontracts/dbra.htm>. Detailed information about the SCA and DBRAs can also be found in WHD's *Prevailing Wage Resource Book* at <http://www.dol.gov/whd/recovery/pwrb/toc.htm>, and chapters 14 and 15 of the WHD Field Operations Handbook at <http://www.dol.gov/whd/FOH/index.htm>.

Additional information on the employer shared responsibility provisions is available at the IRS's webpage at <https://www.irs.gov/Affordable-Care-Act/Employers/Employer-Shared-Responsibility-Provisions>. That website also contains a link to the final regulations under the employer shared responsibility provisions.

General ACA information is available on DOL's dedicated ACA webpage at <http://www.dol.gov/ebsa/healthreform/>, the IRS's dedicated ACA webpage at <https://www.irs.gov/Affordable-Care-Act/Affordable-Care-Act-Tax-Provisions>, and the Department of Health and Human Services' dedicated ACA webpage at <http://www.hhs.gov/healthcare>, as well as at <http://www.healthcare.gov>.

Questions regarding the interaction of the ACA, DBRAs, and SCA may also be directed to the Branch of Government Contracts Enforcement, Office of Government Contracts, Wage and Hour Division, U.S. Department of Labor, 200 Constitution Avenue, NW, Washington, D.C. 20210; telephone number (202) 693-0064.

⁴¹ WHD recognizes that many employers rely on third parties to assist them in complying with fringe benefit obligations; such third parties may, for example, offer benefits packages that include health insurance together with other bona fide fringe benefits for a combined hourly rate. Employers may, of course, take SCA or DBRA credit for any contributions to bona fide fringe benefit plans, including but not limited to employee health insurance costs.