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Technical Review of Draft Bill

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I. Section 1

Section 1 of the draft bill would amend Section 54-52.1-03.4 of the North Dakota Century Code to modify the uniform group insurance program's eligibility rules for temporary employees first employed after December 31, 2013, and to limit the amount any temporary employee can be required to contribute towards the cost of coverage. The purpose of the proposed changes is to prevent the State of North Dakota from being subjected to Employer Shared Responsibility penalties with respect to its temporary employees.

Overview of Affordable Care Act Shared Responsibility Rules

The Affordable Care Act's Shared Responsibility rules, effective for months beginning after December 31, 2013, will impose potential penalties on "applicable large employers"¹ that –

1. fail to offer "minimum essential coverage"² to "full-time employees" and their dependents ("No Coverage"), or
2. offer "minimum essential coverage" to full-time employees and their dependents, but the coverage does not meet certain minimum value and affordability thresholds ("Inadequate Coverage").

For purposes of the Shared Responsibility rules, a Full-Time Employee (FTE) for any month is anyone who is employed on average at least 30 hours of service per week during that month. The IRS is expected to issue guidance on determining which of an employer's employees are FTEs for purposes of these rules. Among other things, future guidance is expected to address how these rules are to be applied to seasonal and other temporary employees who are FTEs.

The Shared Responsibility penalty for No Coverage will be \$2,000 per FTE per year. This No Coverage penalty will be imposed only if at least one FTE purchases coverage in a Health Insurance Exchange and qualifies for a Premium Tax Credit or Cost-Sharing Reduction. A FTE who is not offered minimum essential coverage by his or her employer will qualify for a Premium Tax Credit or Cost-Sharing Reduction if his or her household income is at least 100%, but not more than 400%, of the federal poverty level.

The Shared Responsibility penalty for Inadequate Coverage will be \$3,000 per year for each FTE who –

1. Opts-out of the State's coverage;

¹ An "applicable large employer" generally is any employer that employs an average of at least 50 full-time employees on business days during the preceding calendar year. See IRC § 4980H(c)(2).

² The PERS group health plan will qualify as "minimum essential coverage" assuming it is a "governmental plan" under Public Health Service Act § 2791(d)(8) and assuming its coverage is not limited to "excepted benefits." This technical review assumes the PERS group health plan will qualify as "minimum essential coverage."

2. Purchases coverage in a State Health Insurance Exchange; and
3. Qualifies for a Premium Tax Credit or Cost-Sharing Reduction.

A FTE who is offered minimum essential coverage by the State will qualify for a Premium Tax Credit or Cost-Sharing Reduction only if –

1. The State’s coverage:
 - a. Does not meet a 60% minimum value threshold, or
 - b. Is unaffordable to the employee, meaning the employee’s required contribution for self-only coverage exceeds 9.5% of his or her household income; AND
2. The employee’s household income is at least 100%, but does not exceed 400%, of the federal poverty level.

The Employer Shared Responsibility rules do not apply with respect to part-time employees (i.e., anyone who, for a month, works an average of less than 30 hours per week).

Summary of Section 1

Section 1 of the draft bill would make the following two amendments to Section 54.52.1-03.4 of the North Dakota Century Code:

1. The first amendment would make any temporary employee “first employed after December 31, 2013 ... eligible to participate in the uniform group insurance program only if the employee meets the definition of a full-time employee under section 4980H(c)(4) of the Internal Revenue Code [26 U.S.C. 4980H(c)(4) in effect on April 15, 2011.”
2. The second amendment would preclude any temporary employee’s contribution for coverage from exceeding “... the maximum employee required contribution specified under section 36B(c)(2)(C) of the Internal Revenue Code [26 U.S.C. 36B(c)(2)(C)] in effect on March 23, 2010”

Comments on Amendment #1

The first amendment would ensure that temporary employees first employed after December 31, 2013 could not expose the State to the No Coverage penalty. This is so because these temporary employees would be eligible to participate in the uniform group insurance program if they are full-time employees for purposes of the Employer Shared Responsibility rules. However, the following two edits are needed to the draft language:

- a. A closing bracket (i.e., “]”) is needed at the end of the cite to 26 U.S.C. 4980H(c)(4); and
- b. The clause “in effect on April 15, 2011 should be deleted because IRC § 4980H(c)(4) will not become effective until months beginning after December 31, 2013.

The first amendment does not alter the eligibility requirements for temporary employees first employed on or before December 31, 2013. If any of these temporary employees are full-time employees for purposes of IRC § 4980H(c)(4) at any time after January 1, 2014, but are not eligible to participate in the

uniform group insurance program, they may expose the State to Employer Shared Responsibility penalties.

Comments on Amendment #2

The second amendment would ensure that any temporary employee who is eligible to participate in the uniform group insurance program could not expose the State to the Inadequate Coverage penalty based on the temporary employee's cost of coverage. This is so because it would prevent any temporary employee from paying more than 9.5% of his or her household income to obtain coverage.

In fact, the second amendment goes further than necessary to avoid Employer Shared Responsibility penalties. Specifically, the amendment does not limit the temporary employee contribution cap only to those temporary employees with household incomes of at least 100%, but not more than 400%, of the federal poverty level. As noted, an individual may not qualify for a Premium Tax Credit or Cost-Sharing Subsidy if his or her household income is less than 100%, or exceeds 400%, of the federal poverty level. However, no change to this approach is recommended due to the administrative impracticality of applying this type of limit.

One potential modification to the second amendment would be to insert the phrase "for self-only coverage" immediately after the word "contribution" the first and third time it appears in the amendment. The affordability threshold applies only with respect to self-only coverage. The required employee contribution for family coverage can exceed 9.5% of an employee's household income without exposing the State to Employer Shared Responsibility Penalties.

Finally, the second amendment should be modified by striking the phrase "in effect on March 23, 2010". Section 36B(c)(2)(C) of the Internal Revenue Code will not become effective until tax years ending after December 31, 2013.

II. Section 2

Section 2 of the draft bill would amend Section 54-52.1-18 of the North Dakota Century Code relating to the high-deductible health plan alternative. The objectives of these changes are to:

1. Ensure the State's high-deductible health plan option can be offered to political subdivision employees.
2. Clarify that political subdivisions are not required to make the same employer contribution to their employees' HSAs as the State is required to make to its employees' HSAs.

Comment

The draft bill would achieve the two objectives identified above.

However, the following is a general observation about current Section 54-52.1-18.

Total annual contributions to health savings accounts may not exceed certain limits established by Section 223(b) of the Internal Revenue Code. For 2013, the contribution limit is \$3,250 for eligible

individuals³ with self-only coverage, and \$6,450 for eligible individuals with family coverage.⁴

Additionally, an eligible individual who is at least 55 years old as of the end of a tax year may contribute (or have contributed on his or her behalf) an additional \$1,000 regardless of whether he or she has self-only or family coverage. However, an otherwise eligible individual may not contribute any amount to a health savings account for any month in which he or she is eligible for Medicare.

In order to avoid inadvertent violations of these health savings account contribution limits, Section 54-52.1-18 should be modified by adding the following to the beginning of the fifth sentence: "Subject to the limits of Section 223(b) of the Internal Revenue Code [26 U.S.C. 223(b)], ...".

³ An "eligible individual" generally is anyone who is covered by a high-deductible health plan and is not covered by any health plan that is not a high-deductible health plan. See IRC § 223(c)(1).

⁴ See IRS Revenue Procedure 2012-26.

APPENDIX

The following reproduction of the draft bill includes the modifications recommended in this technical review. The recommended modifications are highlighted in yellow.

A BILL for an Act to amend and reenact sections 54-52.1-03.4 and 54-52.1-18 of the North Dakota Century Code, relating to the definition of an eligible employee, payment of the cost of uniform group insurance premiums for temporary employees, and the health savings account option offered to political subdivisions as part of the high-deductible health plan alternative under the uniform group insurance program.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

SECTION 1. AMENDMENT. Section 54-52.1-03.4 of the North Dakota Century Code is amended and reenacted as follows:

54-52.1-03.4. Temporary employees and employees on unpaid leave of absence.

A temporary employee employed before August 1, 2007, may elect to participate in the uniform group insurance program by completing the necessary enrollment forms and qualifying under the medical underwriting requirements of the program. A temporary employee employed on or after August 1, 2007, is only eligible to participate in the uniform group insurance program if the employee is employed at least 20 hours per week and at least 20 weeks each year of employment. A temporary employee first employed after December 31, 2013, is eligible to participate in the uniform group insurance program only if the employee meets the definition of a full-time employee under section 4980H(c)(4) of the Internal Revenue Code [26 U.S.C. 4980H(c)(4)] in effect on April 15, 2011. The temporary employee or the temporary employee's employer shall pay monthly to the board the premiums in effect for the coverage being provided but in no event may the temporary employee's required contribution for self-only coverage exceed the maximum employee required contribution specified under section 36B(c)(2)(C) of the Internal Revenue Code [26 U.S.C. 36B(c)(2)(C)] in effect on March 23, 2010, and the employer shall pay any difference between the maximum employee required contribution for self-only coverage and the cost of the premiums in effect for the coverage

1 being provided. An employer may pay health or life insurance premiums for a permanent
2 employee on an unpaid leave of absence. A political subdivision, department, board, or agency
3 may make a contribution for coverage under this section.

4 **SECTION 2. AMENDMENT.** Section 54-52.1-18 of the North Dakota Century Code is
5 amended and reenacted as follows:

6 **54-52.1-18. High-deductible health plan alternative with health savings account**
7 **option.**

8 The board shall develop and implement a high-deductible health plan ~~with a health~~
9 ~~savings account~~ as an alternative to the plan under section 54-52.1-06. The high-deductible
10 health plan alternative with a health savings account must be made available to state
11 employees by January 1, 2012, ~~and~~. The high-deductible health plan alternative may be
12 offered, at the discretion of the board, to political subdivisions after June 30, 2013. Health
13 savings account fees for participating state employees must be paid by the employer. Subject
14 to the limits of Section 223(b) of the Internal Revenue Code [26 U.S.C. 223(b)], ~~the difference~~
15 ~~between the cost of the single and family premium for eligible state employees under section~~
16 ~~54-52.1-06 and the premium for those employees electing to participate under the high-~~
17 ~~deductible health plan under this section must be deposited in a health savings account for the~~
18 ~~benefit of each participating employee. For political subdivision employees, the board shall~~
19 ~~deposit into a health savings account for the benefit of a participating political subdivision~~
20 ~~employee, an amount equal to the difference between the primary plan premium as~~
21 ~~established by the board and premium for the high-deductible health plan under this section.~~
22 Each new employee of a participating employer under this section must be provided the
23 opportunity to elect the high-deductible health plan alternative. At least once each biennium,
24 the board shall have an open enrollment period allowing existing employees of a participating
25 employer under this section to change their coverage.