

**2013 HOUSE GOVERNMENT AND VETERANS AFFAIRS**

**HB 1059**

# 2013 HOUSE STANDING COMMITTEE MINUTES

House Government and Veterans Affairs Committee  
Fort Union Room, State Capitol

HB 1059  
January 17, 2013  
17355

Conference Committee

Committee Clerk Signature

*Carmen Hart*

## Explanation or reason for introduction of bill/resolution:

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.

## Minutes:

You may make reference to "attached testimony."

**Chairman Jim Kasper** opened the hearing on HB 1059.

**Sparb Collins, Executive Director of the North Dakota Public Employees Retirement System**, appeared and presented the attached testimony. **Attachment 1** (2:04-3:48). After reading the sentence in Section 1, "The Shared Responsibility penalty for No Coverage will be \$2,000 per FTE per year," he expanded on this. Under the Affordable Care Act, someone who is defined as eligible is not offered coverage and they go out into the exchange, the employer is subject to a \$2,000 fine times the number of full-time employees for that year. The state of North Dakota has approximately 15,000 potential employees that would meet that definition. (Continued 4:21-4:23)

**Chairman Jim Kasper** Give us a definition of temporary employees.

**Sparb Collins** The definition of temporary employees under the existing PERS statute is someone who works on an average of 20 or more hours per week for 5 or more months out of the year. That is the definition that is being modified. The federal definition is someone that works on average of 30 or more hours a week during a month. That said, now things start to get complicated. What we are amending here is to put that definition into statute and that would say who is eligible. There are proposed rules out to help employers determine how to apply that 30 or more hours per week per month, because the obvious question is how do you do that? They have issued some proposed rules, and these rules will allow an employer to determine this eligibility to do some what they call "look back" provisions. You can look back to this eligible group anywhere from a 3-month period to a 12-month period. If you pick 12 months to look back to see who is eligible, then you have to offer that employee 12 months of coverage going forward. You are going to look back at your temporary employees over the last 12 months. You are going to apply that 30 or more hours per week and say this employee, this employee met that and then you are going to offer them coverage for the next 12 months. Then you are going to have to do another look

back in another 12 months. As you deal with the incoming employees, if it is clear that employee is going to meet that criteria, you would potentially offer them coverage. If they don't, then you are going to have again do an examination of those employees. That is what we generally understand based upon some of the regulations that have been proposed. All of this will probably evolve even further in the months to come as these proposed regulations after \_ get moved toward become more refined. We also need from a prospective standpoint--what we are doing in this bill is we are just modifying the procedure, the definitions in PERS, for our participating employers. So to say that anybody who is eligible under the federal law is eligible under our plan. With that in mind, these other things that I talk about, these eligibilities, these types of things, that is not going to be a PERS issue. It is going to be an employer issue. It drops down to the employer to make sure that they offer this to the right people, and they get the opportunity to elect whether they want a 3-month or a 12-month look back period. When I talk about these fines, these fines don't come back to PERS. They come back to the employer. For example, if the state of North Dakota is one of our employers, if something happens to them, they could be subject to a fine whereas the county x out there who is a member of PERS may not be, because they are doing it in compliance. (Continue testimony 9:10-9:23) While you are exposed to this penalty, if none of your employees go out to the exchange and get coverage there, you may not get penalized. For an entity like the state of North Dakota, if they are not denied here, they probably will end up in the exchange. (Continue testimony 9:43-10:30) There are two levels of penalties that are potentially imposed on the employer. One is the no coverage which we just talked about. You don't offer coverage to somebody that is eligible. The second one is if it is unaffordable. Our plan design is such that it is not unaffordable. If you charge them, the federal law says that you can only charge when an eligible employee no more than 9 ½% of their household income. What we are saying in the second one is just that. When you offer it to this temporary employee, you cannot charge them any more than 9 ½% of their household income. This could be another level of effort at the payroll level, because we are all use to dealing with a premium that is x dollars. Underneath this, the premium is going to be no more than 9 1/2% of their household income. This is the minimum level to comply but that means the premium for these people out there are going to be all different kinds of premiums.

**Rep. Scott Louser** When you say 9 ½% of household income, does that include the spouse?

**Sparb Collins** Here again is another area that we will have to guidance in federal rules. That is what it says in the statue. You know the statue now is subject to interpretation. The last conversation I had with our consultant is that it looks like with the federal guidance they will look back and they will look at somebody's W-2 income for that period. If an employer is looking back at an employee over 12 months, they are going to have the 12 months worth of income. They will have a W-2 for that, and they can go to the employee's W-2 and it would be limited to that.

**Chairman Jim Kasper** Where it says household income, it means household so it would mean a spouse?

**Sparb Collins** Under the statue, yes.

**Chairman Jim Kasper** How do we verify spouse's income?

**Sparb Collins** Our consultant was indicating the most current thinking was that the administrative rules will say that you can just go to the W-2 income.

**Chairman Jim Kasper** The income of the employee?

**Sparb Collins** Of the employee.

**Chairman Jim Kasper** They are going to disallow the spouse's income when it says household?

**Sparb Collins** That is what he was hearing was the possible thing that was going to come out of the rules.

**Chairman Jim Kasper** Have they given you any written opinions?

**Sparb Collins** No. At this point I am passing along to you what he is kind of hearing. On those look back periods, there have been some proposed rules.

**Chairman Jim Kasper** You have written opinions from the consultants on those?

**Sparb Collins** On look back. I do have a copy that I will share with you on something that came from them on this. Here again, it is proposed.

**Chairman Jim Kasper** Our dilemma is it is proposed to be implemented by December 31, 2013 and we are gone in April. How do we craft legislation that is going to maybe meet the current rules and maybe meet new rules that we don't even know about yet?

**Sparb Collins** That is why, to a degree here, we are just referencing the statutory code. Then we will be able to go to the administrative provisions at some point.

**Chairman Jim Kasper** That gives us our out.

**Sparb Collins** It gives us some flexibility.

**Rep. Ben Koppelman** When you are talking about figuring out using the W-2 for income and whether or not that were to pertain to both that employee and their spouse or not, we are just talking about temporary employees. Chances are that whether temporary until they become permanent or strictly temporary, their looking back at the W-2 is not going to necessarily be a fair valuation of what their household income is because they might be taking a new job that potentially pays much more than what their old job was. Isn't that true?

**Sparb Collins** It is true. If they are a temporary employee for the last 12 months with an employer, that last 12 months of temporary employment isn't necessarily predictive of the actual next 12 months of temporary employment. They may have worked so many hours last 12 but in the next 12, the employer increases them. I am not sure how they are going

to fully reconcile that. Here is a term they use at the federal level on some of these things. They create what you call safe harbors. If you operate within these safe harbors, you won't be subject to any particular penalties. They might say a safe harbor is that if you use the W-2 for the last 12 months for the next 12 months, you are okay.

**Rep. Ben Koppelman** Under those defined rules wouldn't it be reasonable for an employer to look at that 9 ½%? If an employee was to make that claim saying well, I am required to pay more than 9 ½% of my household income, couldn't you do that as an expectation in arrears? In other words, couldn't you say okay for 2014, I was required to pay more than 9 ½% of my household income. Here is my documentation. Here is my tax return from 2014, and the employer says oh, based on what we expected you to make, we didn't think it was 9 ½%. Couldn't they make a correction and be in the right? This sounds like if you are using past income, most people's income if they are at a steady job increases year to year. It doesn't decrease. The theory is that you are always paying a bit more than what the statute that you are telling us would suggest. Does that make sense?

**Sparb Collins** You make excellent points. I don't have an answer to it. As they move forward, we will find out what we find out. The timeframe for compliance--it was one thing to be having these questions a year ago--it is another thing to be having these questions now when we are less than 12 months from implementation. Hopefully, in the months to come, we will get clear guidance that tells us exactly what to do.

**Rep. Gail Mooney** For temporary employment status according to state definition, it is 20 hours and then 5 months?

**Sparb Collins** It is 20 or more hours per week for 20 weeks. He handed out **Attachment 2**. This is the definition of full time in NDCC and the existing definition of temp.

**Rep. Gail Mooney** Regarding penalty, it would be to the employer entity? If it is a county, the penalty goes to the county. If it is the state, it goes to the state. Whichever entity is the acting employer through PERS?

**Sparb Collins** Right. PERS would not be subject to any penalties underneath this. It is going to be the employer. There isn't a clear answer for us yet on this. For the state of North Dakota, who is the employer? Is the employer Higher Education? Is the employer the Tax Department? Is the employer the state of North Dakota? Who is the employer at the state level?

**Rep. Gail Mooney** That is part of our definitions?

**Sparb Collins** We are going to have to get some guidance from them. The employer is going to make a determination on how they do this look back. One of the counties could do a six month look back and another one could do a different one. That is all okay underneath this, but when we come to the state of North Dakota, who makes the decision?

**Chairman Jim Kasper** You just passed out our definition of temporary and state statute. Our meaning entire state employees. We do have a temporary statute that says everybody has to live by it, all the various departments.

**Sparb Collins** In order for eligibility in PERS. When we amend the federal, that would apply to all of them. When one employer doesn't follow the federal statute, they would be subject to penalty. Employers, like Morton County, would be penalized for not following. For the state of North Dakota, does the penalty go across the entire state, or is the Tax Department the employer? Is Higher Education the employer?

**Chairman Jim Kasper** Wouldn't we want to make this legislation specific about who the employer is and define it? If this is going to impact all of the state employees, wouldn't we want to require every state department to follow the guidelines that we implement in this legislation if we pass it?

**Sparb Collins** That would be an option. What we are doing here is making sure from the PERS standpoint, all of the federal compliance provisions are there and then at the employer levels, they can make their decisions that they need to do.

**Chairman Jim Kasper** Forget about the counties. What I am talking about is the state employees we directly impact. For those employees in the various departments of state government, isn't it wise that we require, through this bill, that all of the division of state government follow what we are going to implement here? If we don't, obviously the end result is the state of North Dakota is liable.

**Sparb Collins** I don't know the answer to that. For example, when we do these look back periods to the extent some state employers may find that a 6 month look back period is better than a 12 month look back period. Each of those employers determine how they are going to make sure they don't get penalized may be advantageous. On the other hand, if the penalty only applies to that single employer, your risk is limited. If we say in statute that the entire state is the entity, maybe we somehow imply that the penalty then apply to the entire state. I am sorry I am not giving you a good answer.

**Chairman Jim Kasper** It is a dilemma.

**Rep. Marie Strinden** When we were talking about HB 1058 for the retired PERS employees, the act becomes effective on July 1, 2015. I am wondering why that is a later date than this bill?

**Sparb Collins** This one is put into place because there is a firm federal requirement that it has to be done at this time. We don't have the flexibility to do that. In the case of the pre-Medicare, that is not a federal requirement whether we do this or not, so we have the flexibility to put the implementation date back so that we have the opportunity to more fully understand all of these regulations and procedures before we implement that.

**Rep. Marie Strinden** Which of the new pieces of language in this bill are mandated by the Affordable Care Act, and do you add anything that would be North Dakota policy that is not under the Affordable Care Act?

**Sparb Collins** In Section 1 of the bill, it is just the Affordable Care Act language. When we get to Section 2 of the bill, I will talk about that. That is not necessarily related to the

Affordable Care Act. You can see in Section 1 the changes that are being made are just referencing federal statutes out there. What that means is probably since we are referencing federal legislation, each year we probably will have to come back to you and get that reinstated.

**Chairman Jim Kasper** Any other committee questions on this section being we are here?

**Rep. Ben Koppelman** With the definition we had for temporary employee, being 20 or more hours for 20 weeks, that theoretically would have a qualification period by virtue of, if you are 20 hours for 4 weeks, you wouldn't have benefits until, I am assuming, after you got to your 20<sup>th</sup> week. Under the federal guideline that you told us about, that suggests that if somebody works one week, they would have to have coverage. Is that true or is there a qualification period that you hadn't told us about?

**Sparb Collins** Let me start with the existing state provision. We rely upon the payrolls. The payroll person says we are hiring a full time temporary employee. They will get signed up right away. They pretty much, based upon their determination, will say whether that employee gets offered the coverage. Later on the increased employment and they were below the threshold, they increase it, then they can offer it at that time based upon that. We don't have in ours any look back periods. Under the federal one, here again the federal law says that if they know they are going to be meeting that threshold, then they understand they need to offer it. If the employee is an hourly or seasonal employee under the proposed regulations, they have an opportunity to do a waiting period and a look back to see about eligibility.

**Rep. Gail Mooney** There is really no difference between seasonal temporary or temporary. It is all based on the continuation of their employment from point 1 through the 20 weeks. Correct?

**Sparb Collins** Under the state provision we just look to them to make that determination. Under the federal one there is some definition between what they called hourly and seasonal. If you are hourly and seasonal and are unable as an employer to determine whether you are going to meet that threshold, you can have them on and then do a look back type of period on that employee. (Continuing testimony last paragraph, first page 29:32-31:08) Let me stop here. Underneath state statute, as you will see in that handout (**Attachment 2**), there is a definition of full time employee. What is going to be confusing here is I am going to be using full time employee in the terms of the state statute and full time employee in terms of the federal statute. The full time definition of employee under the state statute, we are not altering. The reason why is that the full time employee underneath the state statute gets their premium paid at 100%. The definition under federal statute of full time employee is broader than the definition of full time employee in state statute. We have changed the definition of temporary out here so that we comply overall with the definition of full time temporary employee but we are not altering full time for the state. If we did, if we would have gone into that portion of the statute to do it, then however number of these people would, instead of being charged 9 ½% of their income, they would have had 100% of the premium paid for. (Continuing 32:36-32:54) Again let me stop here. This \$2 million that you see on the fiscal note just indicates that based upon some runs that were done by Higher Education and some runs that were done looking back on payroll, we looked and we

said well you look back over this period. This is the potential number of people that could be eligible. Here is what their potential average salary is. That appropriation for those dollars, the money for that is not in this bill. The money for it is in the Office and Management's budget bill over there. This bill changes the definitions, and we just wanted to share with you what the potential fiscal cost of that is, but the actual appropriation for that is in the Office and Management's budget appropriation over in another bill.

**Chairman Jim Kasper** Why did we use 12 month look back when we could have used a lesser period of time look back?

**Sparb Collins** We had to pick one to come up with a cost. We talked about what might be the one that has the least cost impact. We thought it would be 12. If we used a 3 month look back potentially--in the state, for example, Parks and Rec hires a bunch of employees for the summer for a 3 month period. The Department of Transportation hires people during the construction season which can run 4 or 5 months. The Tax Department is going to hire employees during the tax season. The thought was that using a 12 month period normalizes that to a greater degree than a shorter period.

**Chairman Jim Kasper** We have to do a look back for all state of North Dakota eligible employees? The minimum look back is 5 months?

**Sparb Collins** Three.

**Chairman Jim Kasper** If we did a 3 month look back, wouldn't we eliminate all the rest of those employees back there the other 9 months and not have to worry about them?

**Sparb Collins** No. What you would have to do is you do a 3 month and you have to look back every 3 months. You would be looking back 3 months and you would be pulling up those 3. You are going to be offering them for the next 3.

**Chairman Jim Kasper** This is an ongoing look back.

**Sparb Collins** Once you pick, you are always going to be doing look backs. That is why the 12 was selected, because it would normalize out these shorter term peaks that might be associated with specific workloads in specific agencies.

**Rep. Ben Koppelman** Is there anything with various privacy rules that say that you cannot ask for the information of their spouse's income to determine household income?

**Sparb Collins** Not that I am aware of. When we get the information or when it is used for purposes of the health insurance, it is confidential under state law. There are HIPPA provisions that make information confidential.

**Rep. Scott Louser** Something has caught my eye and it is safe harbors as defined by IRS. We have yet defined a safe harbor versus what is called the rebuttal presumption. Really the difference is that the state would have to prove they are in compliance under rebuttal presumption versus a broad defined safe harbor. Is the safe harbor defined in the IRS broad and well defined? Does it provide protection to the state? Are you familiar at all with

the rebuttal presumption which is out there and not discussed which wouldn't require the state to prove to the federal government that we are in compliance?

**Sparb Collins** I don't know the answer to that. (Continuing on with Section 2 38:40-39:58) Let me clarify this a little bit. We will offer to political subdivisions in the last half of 2013 the high deductible insurance plan. They can take our high-deductible health insurance plan, and then they can independently go out and hire a HSA vendor and do direct payroll feeds from their payroll to the HSA vendor and set the amount. If we maintain the provision that they had to do the high deductible health insurance plan and use the state's HSA vendor, then these HSA contributions would have to be funneled back through PERS and from PERS potentially back out to the vendor. We are just trying to make this a little more efficient. Let the political subdivisions in the direct relationship to it.

**Rep. Karen Karls** What is the level of participation been in that higher deductible plan?

**Sparb Collins** I don't have a percentage, but I do have an approximate number. We started out the first year with about 80 contracts and we are up now to about 130 contracts. I would expect, as we continue to move forward, the number of contracts in that will continue to grow as we get the opportunity to educate more people about it. Even more important than the education, is the actual experience of the employee. As you get more employees out there doing it and they tell their counterpart that it worked out good for them, we are just going to see that it will increase.

**Chairman Jim Kasper** Page 2, Line 9, of the bill, I notice you are crossing out with a health savings account and on Line 11 you are adding with a health savings account. Is there a reason for that change?

**Sparb Collins** What is trying to be done there is that the first one relates to the political subdivisions, and the second one just says that for the state portion of the plan we are going to continue to maintain the health savings account for the state employees.

**Chairman Jim Kasper** What you are saying is the board shall develop and implement a high deductible health as an alternative to the plan under Section 54-52.1-06? That will be for the political subdivisions?

**Sparb Collins** That will be for the state and political subdivisions. They will have the high deductible health insurance plan. The next sentence goes on the high deductible health insurance alternative with a health savings account must be made available to state employees. It is maintaining that what we offer now to the state employees is going to stay the same.

**Chairman Jim Kasper** Are you implying that you may have a third option of a high deductible plan without a HSA option?

**Sparb Collins** Not for state employees.

**Chairman Jim Kasper** Are you saying that there you could develop one for the political subdivisions? They could have three options--high deductible with a HSA, a high deductible without, and the normal PERS plan?

**Sparb Collins** What the political subdivision has today is the normal PERS plan. With the bill as it passed last time, they can pick the high deductible health insurance plan as an alternative to the normal plan. This bill just modifies it to say that we could offer the high deductible health insurance plan to them without the health savings account. If this change didn't occur, we would offer it to them based upon what is approved last time, a high deductible health insurance plan with our health savings account.

**Chairman Jim Kasper** They could have a high deductible health plan and they could have a health savings account but it will be their health savings account, not the North Dakota PERS health savings account?

**Sparb Collins** Yes. We are thinking that would be more efficient because if they are required to take ours, the money has to flow through us back out to the vendor. This way they can have a direct relationship with the vendor.

**Chairman Jim Kasper** Have you developed a premium structure for the high deductible plan, the single, single plus dependent, and family premium structure, because it obviously is a different premium structure than the more fully...?

**Sparb Collins** Yes. I don't have that along. I will get that for you.

**Chairman Jim Kasper** Could you get that for us? Explain the employees who are in the state HSA plan. Is the state of North Dakota depositing additional dollars into their HSA which is the difference between the normal premium and the high deductible premium? Could you get information on what those dollars are?

**Sparb Collins** If you have a single contract, it is one amount. If it is a family contract, it is a different amount.

**Chairman Jim Kasper** Could you provide us a copy of the federal statute on the temporary employee definitions? If you have any consultants' opinions, please give these to the committee.

**Sparb Collins** That would be the definition of full time employees. **Attachments 3, 4, 5** were provided at the end of the hearing.

**Scott Louser** If we are changing the definition in North Dakota, does it affect any other benefit package or any other area of employment aside from Affordable Care Act? I am assuming we have a definition, because history has shown what works for our state?

**Sparb Collins** This is limited to just the state. It won't have any broader definition beyond the participants in PERS if that is the question. It will affect participants in the PERS. If a political subdivision elects to participate in PERS, that will be the eligibility requirement for them.

**Rep. Ben Koppelman** With that new definition of full time, are there other sorts of benefits like retirement dental, vision, any other fringe benefits that now we are going to be paying for because we tried to comply with the unaffordable care act?

**Sparb Collins** For retirement, absolutely no, because that is in a separate section of the statute. This definition is 54.52.1 and that applies to the group insurance programs. The big group insurance program is the health. Then there is dental and vision. Let me follow up on the dental and vision and make sure I give you the right answer on that.

**Chairman Jim Kasper** There is another area that we need to address before we get this bill in final form and that is definition of employer. Currently what does the state statute say? Is the state of the North Dakota the employer? Is it the various departments? What are the advantages and disadvantages of naming each department as their own employer for purposes of complying? If one department is complying and five of them are not, would we be able to charge that department's budget for their noncompliance when they know what the compliance rules are?

**Sparb Collins** Let me give that some thought.

There was no opposition.

**Chairman Jim Kasper** Notice I assigned myself to carry this bill. I really had no intention of assigning any bills to myself, but when I saw this bill and how confusing it can be, I thought I might be the one. If anyone would like to carry it, I will certainly advocate that assignment.

The hearing was closed on HB 1059.

# 2013 HOUSE STANDING COMMITTEE MINUTES

House Government and Veterans Affairs Committee  
Fort Union Room, State Capitol

HB 1059  
January 24, 2013  
17717

Conference Committee

Committee Clerk Signature

*Carmen Hart*

## Explanation or reason for introduction of bill/resolution:

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

## Minutes:

You may make reference to "attached testimony."

**Chairman Jim Kasper** opened the session on HB 1059.

**Sparb Collins, Executive Director of ND PERS** went over **handout 1** which answered questions from the previous week's hearing. (End 3:25)

**Vice Chair Randy Boehning** Where is this money coming from? (Referring to question 2)

**Sparb Collins** It is the difference between the full cost of the regular state plan and the lower cost high deductible plan. (4:27-5:32) He expanded some information. That definition of temporary employee that we put in there had two parts to compliance. One was to make sure that it covered everybody who worked 30 or more hours during a month. The second part was we couldn't charge those people under the federal law more than 9 1/2% of their household income. Today temporary employees have to pay 100%. This is kind of limiting that. The chapter that we made this change in is the group insurance program, health, dental, vision, long term care, and employee assistance program. It extended that 9 1/2% not just the health insurance plan, but the dental and vision. (7:17-8:42)

**Chairman Jim Kasper** The answer is no to question 6?

**Sparb Collins** Right. We don't seem to need to define it further.

**Rep. Ben Koppelman** In response to the one (question 6) you just went over and the determination that the state of North Dakota is the employer and not a political subdivision or an agency, are you aware of any collection ability that the Internal Revenue Service has in the case that they want to penalize? Are you aware of any tool that they have at their disposal to be able to enforce that penalty?

**Sparb Collins** The only ones I am aware of and that is what this bill responds to making sure that we don't is that number one, you don't offer coverage to all your full time employees. If you don't, the employer then is subject to a fine of \$2,000 times the number of full time employees we have. This bill puts into place that we will offer it to all those employees. The second part is if you don't offer affordable coverage to the employee and that is if you charge them more than 9 ½%, and again this bill says you can't charge them more so again we are in compliance.

**Rep. Ben Koppelman** How are they going to collect that money?

**Sparb Collins** That goes beyond me. There was explanation of P. 19 and 21 of the handout 1. (11:58-17:19)

**Vice Chair Randy Boehning** How many of these so called small employers do we have in PERS?

**Sparb Collins** We have quite a few of the counties in. In terms of larger cities, Grand Forks and Fargo are in. We have a lot of school districts. We have about 25,000 contracts in the plan. Out of that about 6,000 are retirees and about 14,000 or 15,000 are state contracts. The difference is the political subdivisions.

**Vice Chair Randy Boehning** Would that raise their premium if we end up losing 3,500 people off the plan?

**Sparb Collins** It is only going to apply right now to the smaller ones. In any given year if those going off fall in that 20% that take up 80% of our dollars, it could be beneficial to us.

**Chairman Jim Kasper** You are suggesting all amendments in this packet?

**Sparb Collins** Yes, they are all here (P. 17 and P. 21).

**Chairman Jim Kasper** Go through the fiscal note.

**Sparb Collins** The fiscal note on this bill reflects the cost relating to changing that definition of full time employee and not being able to charge these full time employees more than 9 ½% of their income. The money for that isn't in this bill before you today. The fiscal note is supplying you the information to say this is kind of the cost of it. The actual appropriation authority for it is in the OMB's budget bill (SB 2015).

**Chairman Jim Kasper** The date on the fiscal note is 1220?

**Rep. Steven Zaiser** moved to adopt the amendment on P. 17 of the handout.

**Vice Chair Randy Boehning** seconded the motion.

Voice vote taken and **amendment adopted.**

**Rep. Vernon Laning** moved to adopt the second amendment on P. 21 of the handout.

**Rep. Vicky Steiner** seconded the motion.

Voice vote was taken and **amendment adopted.**

**Vice Chair Randy Boehning** moved for a Do Pass as amended.

**Rep. Vernon Laning** seconded the motion.

**Rep. Ben Koppelman** I am going to vote no on this. The reason is I don't believe this is an unfunded mandate and we constantly fight unfunded mandates from the federal government. What we know about the federal government is that over time they fund less and less of those mandates and it falls more and more on the state. We have less and less opportunity to direct where we spend money.

**Chairman Jim Kasper** During the special session we had a bill on the health insurance exchange that I carried on the floor to try to establish a state health exchange that failed. We had an interim committee for the last interim that discussed the Affordable Care Act in depth and we looked at all these kinds of issues. Then, of course, we had something come along called the Supreme Court ruling. That is what we are stuck with. Therefore, I think we need to move forward with the best legislation we can for the citizens of our state, the employees of our state and move forward in a way that at this point is constitutional.

**Rep. Gail Mooney** You articulated very specifically what was in my mind. Thank you.

A roll call vote was taken and resulted in **DO PASS AS AMENDED, 13-1.** **Rep. Vernon Laning** is the carrier.

Note: The **#2 email** was handed out to the committee members informing them that the OMB appropriations bill is HB 1015.

**FISCAL NOTE**  
**Requested by Legislative Council**  
**12/20/2012**

Bill/Resolution No.: HB 1059

- 1 A. **State fiscal effect:** *Identify the state fiscal effect and the fiscal effect on agency appropriations compared to funding levels and appropriations anticipated under current law.*

	2011-2013 Biennium		2013-2015 Biennium		2015-2017 Biennium	
	General Fund	Other Funds	General Fund	Other Funds	General Fund	Other Funds
<b>Revenues</b>	\$0	\$0	\$0	\$0	\$0	\$0
<b>Expenditures</b>	\$0	\$0	\$1,000,000	\$1,000,000	\$1,000,000	\$1,000,000
<b>Appropriations</b>	\$0	\$0	\$0	\$0	\$0	\$0

- 1 B. **County, city, school district and township fiscal effect:** *Identify the fiscal effect on the appropriate political subdivision.*

	2011-2013 Biennium	2013-2015 Biennium	2015-2017 Biennium
<b>Counties</b>	\$0	\$0	\$0
<b>Cities</b>	\$0	\$0	\$0
<b>School Districts</b>	\$0	\$0	\$0
<b>Townships</b>	\$0	\$0	\$0

- 2 A. **Bill and fiscal impact summary:** *Provide a brief summary of the measure, including description of the provisions having fiscal impact (limited to 300 characters).*

The fiscal implications in this bill relate to adjusting the definition of temporary employees and their premium payment to comply with the shared responsibility provisions of the Affordable Care Act(ACA).

- B. **Fiscal impact sections:** *Identify and provide a brief description of the sections of the measure which have fiscal impact. Include any assumptions and comments relevant to the analysis.*

Section 1 of the bill would change the definition of temporary employee to comply with the definition requirement to meet the shared responsibility requirement of the Affordable Care Act (ACA) and to avoid any penalties for non-compliance. Pursuant to the ACA these employees can be charged no more than 9.5% of household income. This additional employer premium requirement is estimated in the expenditures and the additional appropriation is shown as well. The appropriation for this expenditure is in the OMB budget under Health Insurance Pool - Temporary Employees.

3. **State fiscal effect detail:** *For information shown under state fiscal effect in 1A, please:*

- A. **Revenues:** *Explain the revenue amounts. Provide detail, when appropriate, for each revenue type and fund affected and any amounts included in the executive budget.*

- B. **Expenditures:** *Explain the expenditure amounts. Provide detail, when appropriate, for each agency, line item, and fund affected and the number of FTE positions affected.*

This expenditure is in the executive budget. The intent language is in HB1015 Section 7.

- 
- C. **Appropriations:** *Explain the appropriation amounts. Provide detail, when appropriate, for each agency and fund affected. Explain the relationship between the amounts shown for expenditures and appropriations. Indicate whether the appropriation is also included in the executive budget or relates to a continuing appropriation.*

The appropriation for this expenditure is in the OMB budget under Health Insurance Pool - Temporary Employees.

**Name:** Sparb Collins

**Agency:** NDPERS

**Telephone:** 701-328-3901

**Date Prepared:** 01/02/2013



January 24, 2013

1/25/13  
JAW  
1/22

PROPOSED AMENDMENTS TO HOUSE BILL NO. 1059

Page 1, line 1, after "sections" insert "54-52.1-03.1,"

Page 1, line 1, after "54-52.1-03.4" insert a comma

Page 1, line 2, after "to" insert "withdrawal of a political subdivision from the uniform group insurance program,"

Page 1, after line 7, insert:

**"SECTION 1. AMENDMENT.** Section 54-52.1-03.1 of the North Dakota Century Code is amended and reenacted as follows:

**54-52.1-03.1. Certain political subdivisions authorized to join uniform group insurance program - Employer contribution.**

A political subdivision may extend the benefits of the uniform group insurance program under this chapter to its permanent employees, subject to minimum requirements established by the board and a minimum period of participation of sixty months. If the political subdivision withdraws from participation in the uniform group insurance program, before completing sixty months of participation, unless federal or state laws or rules are modified or interpreted in a way that makes participation by the political subdivision in the uniform group insurance program no longer allowable or appropriate, the political subdivision shall make payment to the board in an amount equal to any expenses incurred in the uniform group insurance program that exceed income received on behalf of the political subdivision's employees as determined under rules adopted by the board. The Garrison Diversion Conservancy District, and district health units required to participate in the public employees retirement system under section 54-52-02, shall participate in the uniform group insurance program under the same terms and conditions as state agencies. A retiree who has accepted a retirement allowance from a participating political subdivision's retirement plan may elect to participate in the uniform group under this chapter without meeting minimum requirements at age sixty-five, when the employee's spouse reaches age sixty-five, upon the receipt of a benefit, when the political subdivision joins the uniform group insurance plan if the retiree was a member of the former plan, or when the spouse terminates employment. If a retiree or surviving spouse does not elect to participate at the times specified in this section, the retiree or surviving spouse must meet the minimum requirements established by the board. Each retiree or surviving spouse shall pay directly to the board the premiums in effect for the coverage then being provided. The board may require documentation that the retiree has accepted a retirement allowance from an eligible retirement plan other than the public employees retirement system."

Page 1, line 22, after "for" insert "medical and hospital benefits"

Page 2, line 1, after the first "for" insert "medical and hospital benefits"

Page 2, line 2, replace "the" with "this"

Page 2, line 2, remove "being provided"

Renumber accordingly

202



Date: 1-24-13  
 Roll Call Vote #: 1

**2013 HOUSE STANDING COMMITTEE  
 ROLL CALL VOTES  
 BILL/RESOLUTION NO. 1059**

House Government and Veterans Affairs Committee

Check here for Conference Committee  
 Legislative Council Amendment Number P. 17 of the handout

Action Taken:  Do Pass  Do Not Pass  Amended  Adopt Amendment  
 Rerefer to Appropriations  Reconsider

Motion Made By Zaiser Seconded By Boehning

Representatives	Yes	No	Representatives	Yes	No
Chairman Jim Kasper			Rep. Bill Amerman		
Vice Chairman Randy Boehning			Rep. Gail Mooney		
Rep. Jason Dockter			Rep. Marie Strinden		
Rep. Karen Karls			Rep. Steven Zaiser		
Rep. Ben Koppelman					
Rep. Vernon Laning					
Rep. Scott Louser					
Rep. Gary Paur					
Rep. Karen Rohr					
Rep. Vicky Steiner					

*Vote taken  
 Motion carried*

Total (Yes) \_\_\_\_\_ No \_\_\_\_\_

Absent \_\_\_\_\_

Floor Assignment \_\_\_\_\_

If the vote is on an amendment, briefly indicate intent:

Date: 1-24-13  
Roll Call Vote #: 2

2013 HOUSE STANDING COMMITTEE  
ROLL CALL VOTES  
BILL/RESOLUTION NO. 1059

House Government and Veterans Affairs Committee

Check here for Conference Committee

Legislative Council Amendment Number P. 21 of the hardout

Action Taken:  Do Pass  Do Not Pass  Amended  Adopt Amendment  
 Rerefer to Appropriations  Reconsider

Motion Made By Laning Seconded By Steiner

Representatives	Yes	No	Representatives	Yes	No
Chairman Jim Kasper			Rep. Bill Amerman		
Vice Chairman Randy Boehning			Rep. Gail Mooney		
Rep. Jason Dockter			Rep. Marie Strinden		
Rep. Karen Karls			Rep. Steven Zaiser		
Rep. Ben Koppelman					
Rep. Vernon Laning					
Rep. Scott Louser					
Rep. Gary Paur					
Rep. Karen Rohr					
Rep. Vicky Steiner					

*voice vote  
taken  
motion carried*

Total (Yes) \_\_\_\_\_ No \_\_\_\_\_

Absent \_\_\_\_\_

Floor Assignment \_\_\_\_\_

If the vote is on an amendment, briefly indicate intent:

Date: 1-24-13  
Roll Call Vote #: 3

2013 HOUSE STANDING COMMITTEE  
ROLL CALL VOTES  
BILL/RESOLUTION NO. 1059

House Government and Veterans Affairs Committee

Check here for Conference Committee

Legislative Council Amendment Number \_\_\_\_\_

Action Taken:  Do Pass  Do Not Pass  Amended  Adopt Amendment  
 Rerefer to Appropriations  Reconsider

Motion Made By J. Boehning ~~J. Boehning~~ Seconded By Laning

Representatives	Yes	No	Representatives	Yes	No
Chairman Jim Kasper	X		Rep. Bill Amerman	X	
Vice Chairman Randy Boehning	X		Rep. Gail Mooney	X	
Rep. Jason Dockter	X		Rep. Marie Strinden	X	
Rep. Karen Karls	X		Rep. Steven Zaiser	X	
Rep. Ben Koppelman		X			
Rep. Vernon Laning	X				
Rep. Scott Louser	X				
Rep. Gary Paur	X				
Rep. Karen Rohr	X				
Rep. Vicky Steiner	X				

Total (Yes) 13 No 1

Absent \_\_\_\_\_

Floor Assignment Laning

If the vote is on an amendment, briefly indicate intent:

**REPORT OF STANDING COMMITTEE**

**HB 1059: Government and Veterans Affairs Committee (Rep. Kasper, Chairman)** recommends **AMENDMENTS AS FOLLOWS** and when so amended, recommends **DO PASS** (13 YEAS, 1 NAYS, 0 ABSENT AND NOT VOTING). HB 1059 was placed on the Sixth order on the calendar.

Page 1, line 1, after "sections" insert "54-52.1-03.1,"

Page 1, line 1, after "54-52.1-03.4" insert a comma

Page 1, line 2, after "to" insert "withdrawal of a political subdivision from the uniform group insurance program,"

Page 1, after line 7, insert:

**"SECTION 1. AMENDMENT.** Section 54-52.1-03.1 of the North Dakota Century Code is amended and reenacted as follows:

**54-52.1-03.1. Certain political subdivisions authorized to join uniform group insurance program - Employer contribution.**

A political subdivision may extend the benefits of the uniform group insurance program under this chapter to its permanent employees, subject to minimum requirements established by the board and a minimum period of participation of sixty months. If the political subdivision withdraws from participation in the uniform group insurance program, before completing sixty months of participation, unless federal or state laws or rules are modified or interpreted in a way that makes participation by the political subdivision in the uniform group insurance program no longer allowable or appropriate, the political subdivision shall make payment to the board in an amount equal to any expenses incurred in the uniform group insurance program that exceed income received on behalf of the political subdivision's employees as determined under rules adopted by the board. The Garrison Diversion Conservancy District, and district health units required to participate in the public employees retirement system under section 54-52-02, shall participate in the uniform group insurance program under the same terms and conditions as state agencies. A retiree who has accepted a retirement allowance from a participating political subdivision's retirement plan may elect to participate in the uniform group under this chapter without meeting minimum requirements at age sixty-five, when the employee's spouse reaches age sixty-five, upon the receipt of a benefit, when the political subdivision joins the uniform group insurance plan if the retiree was a member of the former plan, or when the spouse terminates employment. If a retiree or surviving spouse does not elect to participate at the times specified in this section, the retiree or surviving spouse must meet the minimum requirements established by the board. Each retiree or surviving spouse shall pay directly to the board the premiums in effect for the coverage then being provided. The board may require documentation that the retiree has accepted a retirement allowance from an eligible retirement plan other than the public employees retirement system."

Page 1, line 22, after "for" insert "medical and hospital benefits"

Page 2, line 1, after the first "for" insert "medical and hospital benefits"

Page 2, line 2, replace "the" with "this"

Page 2, line 2, remove "being provided"

Re-number accordingly

**2013 HOUSE APPROPRIATIONS**

**HB 1059**

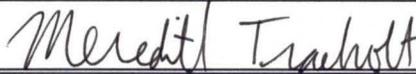
# 2013 HOUSE STANDING COMMITTEE MINUTES

## House Appropriations Committee Roughrider Room, State Capitol

HB 1059  
2/6/13  
Job 18411

Conference Committee

Committee Clerk Signature



### Explanation or reason for introduction of bill/resolution:

A BILL for an Act to amend and reenact sections 54-52.1-03.1, 54-52.1-03.4, and 54-52.1-18 of the North Dakota Century Code, relating to withdrawal of a political subdivision from the uniform group insurance program, 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.

### Minutes:

You may make reference to "attached testimony."

**Chairman Delzer:** We will start with HB 1059.

**Rep. Jim Kasper, District 46:** Introduced the bill. Included testimony provided by Sparb Collins, see Attachment 1.

7:35

**Chairman Delzer:** How many of these are short term employees?

**Rep. Kasper:** It appears about 200 employees will qualify. Any new employee coming on as temporary would have to meet the requirements of the new PPACA laws.

**Chairman Delzer:** We'll want to look at this with OMB and Insurance.

**Rep. Thoreson:** When we (government operations division) looked at HB 1015, the OMB bill, we did ask some questions on that. There is still some uncertainty as to the number of people.

**Chairman Delzer:** We'll have government operations take a look at this.

**Rep. Grande:** If you look at the report by the Employee Benefits Committee, it was sent out with no recommendation because we did not know if this was going to be implemented. When did this come about? We did not have a Fiscal Note of this amount during the time we studied this. Did he give you a time frame he's looking for? Looking at the FN, implementation doesn't begin until 12/31, so we have 6 months we shouldn't have to be covering this. Should the FN not show that?

**Rep. Kasper:** The implementation date is 1/1/14. My FN is dated January 28, and that's all I know.

**Chairman Delzer:** Rep. Thoreson will look into that, as well as any further questions the committee brings to him. Further questions? Thank you. The committee continued on to the next bill.

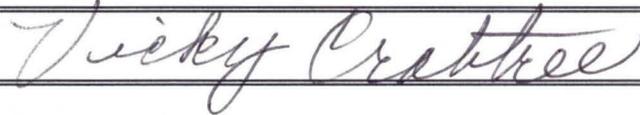
# 2013 HOUSE STANDING COMMITTEE MINUTES

## House Appropriations Committee Roughrider Room, State Capitol

HB 1059  
2/21/13  
Job # 19311

Conference Committee

Committee Clerk Signature



### Explanation or reason for introduction of bill/resolution:

Relating to definition of eligible employee, payment of cost of uniform group insurance premiums for temporary employees and health savings account options offered to political subdivisions as part of the high deductible health plan alternative under the uniform group insurance program.

### Minutes:

**Rep. Thoreson:** HB 1059 was a policy bill. We have not acted on OMB yet and the two kind of tie together. I spoke with Chairman Kasper and he thought regardless of what we did with the money in OMB that 1059 should move forward. We have not taken any action on it in our committee other than holding it there with that. I don't know if we can just send it back to policy committee without a recommendation here.

**Chairman Delzer:** I would not want to do that. If you think it has to go forward, we should probably support it. The bill's here, let's take action on it here. HB 1059 is the policy portion where OMB says there are certain temporary employees that are going to fall under PPACA that have to be insured. It is a policy portion to insure them. Currently they do not qualify for insurance.

**Rep. Thoreson:** We have in the OMB budget there was an amount of \$2M, we've removed because of questions with the affordable care act. Speaking with the chairman of our policy committee, he feels this bill needs to go forward regardless of the funding. I would offer a motion for a Do Pass on 1059.

**Chairman Delzer:** Is there a second?

**Rep. Sanford:** Second.

**Chairman Delzer:** If this bill does not go forward it would probably put OMB on the second side. That's an option that might happen.

**Rep. Skarphol:** The \$2M Fiscal Note, can I assume there are 1000 employees that this would be afflicable too? Is the fine not \$2,000? Or would it be 500 employees for two years?

**Rep. Thoreson:** That is being checked by Sheila for OMB. I don't believe that is the correct number.

**Chairman Delzer:** It's not a case of paying the fine; it is the case of covering them with insurance for the period they are hired as a temporary employee.

**Rep. Skarphol:** This reflects the maximum cost, not the minimum cost?

**Chairman Delzer:** It is a guess.

**Sheila Peterson, OMB:** It's a fairly complicated opportunity to cover temporary employees. There are decisions that need to be made by the state about what look back period we would use. To qualify, a temporary employee had to be working at least 130 hours per month. We looked back over a 12 month period to determine the number of state employees as well as University system employees. This \$2M appropriation covered both. That process eliminated a lot of our seasonal workers. This is just for a single policy. We don't have cover family, just the employee. The employee can be assessed up to 9.5% of their household income that they have to pay. We found an average of what had been paid to the employees who had worked 130 hours or more per month over a 12 month period and came up with these calculations. It is an estimate based on a lot of assumptions, but it is a single policy. We have a range we calculated that there were from \$1.5-2.3M, so we selected \$2M average of which half was general funds and half was non-general funds in our budget recommendation. It is not precise.

**Chairman Delzer:** That shows there are many different variables.

**Rep. Thoreson:** We've had discussion in section and a lot of it is dealing with the federal regulations. There are many questions yet and it is our recommendation to remove the fiscal portion of it.

**ROLL CALL VOTE: 10 y 12 n 0 absent**

**MOTION FAILS**

**Rep. Kempenich:** Do Not Pass motion.

**Rep. Brandenburg:** Second.

**Rep. Glassheim:** If we do not pass this, what happens?

**Rep. Kempenich:** Say there were a 1,000 employees, our penalty would be \$2000 so that is \$200,000 we pay.

**Rep. Glassheim:** I have written down figuring 200 employees at \$482/month. That gets \$556,000/year. When I multiply 200 times \$2000 I got \$400,000. It is not an immense amount and you are giving insurance and not requiring the employees to pay.

**Chairman Delzer:** OMB would probably go to the other half and ask to have it reinstated in their budget. I would guess this would pass on the floor because the policy committee would say it really needs to be passed.

**Rep. Nelson:** By not passing the bill don't we limit the options that PERS has and by bypassing it we give them more flexibility, isn't that true?

**Peterson:** Because ACA is statute at the federal level, PERS has to come into compliance. I don't know if you don't allow them to come into compliance what happens. That is a legal question.

**Rep. Thoreson:** Since we did not do any action in our subcommittee, should we have the chairman of the policy committee come in and explain their actions?

**Chairman Delzer:** No I don't think so.

**Rep. Monson:** I voted yes because I like section 3, the HDHP alternative is something I think we should offer.

**ROLL CALL VOTE: 11 y 11 n 0 absent**

**MOTION FAILED**

**Chairman Delzer:** Let's try a Do Pass Again.

**Rep. Nelson:** I move a Do Pass.

**Rep. Monson:** Second.

**ROLL CALL VOTE: 13 7 9 n 0 absent**

**BILL CARRIE: Rep. Nelson**

**FISCAL NOTE**  
**Requested by Legislative Council**  
**12/20/2012**

Bill/Resolution No.: HB 1059

- 1 A. **State fiscal effect:** *Identify the state fiscal effect and the fiscal effect on agency appropriations compared to funding levels and appropriations anticipated under current law.*

	2011-2013 Biennium		2013-2015 Biennium		2015-2017 Biennium	
	General Fund	Other Funds	General Fund	Other Funds	General Fund	Other Funds
<b>Revenues</b>	\$0	\$0	\$0	\$0	\$0	\$0
<b>Expenditures</b>	\$0	\$0	\$1,000,000	\$1,000,000	\$1,000,000	\$1,000,000
<b>Appropriations</b>	\$0	\$0	\$0	\$0	\$0	\$0

- 1 B. **County, city, school district and township fiscal effect:** *Identify the fiscal effect on the appropriate political subdivision.*

	2011-2013 Biennium	2013-2015 Biennium	2015-2017 Biennium
<b>Counties</b>	\$0	\$0	\$0
<b>Cities</b>	\$0	\$0	\$0
<b>School Districts</b>	\$0	\$0	\$0
<b>Townships</b>	\$0	\$0	\$0

- 2 A. **Bill and fiscal impact summary:** *Provide a brief summary of the measure, including description of the provisions having fiscal impact (limited to 300 characters).*

The fiscal implications in this bill relate to adjusting the definition of temporary employees and their premium payment to comply with the shared responsibility provisions of the Affordable Care Act(ACA).

- B. **Fiscal impact sections:** *Identify and provide a brief description of the sections of the measure which have fiscal impact. Include any assumptions and comments relevant to the analysis.*

Section 1 of the bill would change the definition of temporary employee to comply with the definition requirement to meet the shared responsibility requirement of the Affordable Care Act (ACA) and to avoid any penalties for non-compliance. Pursuant to the ACA these employees can be charged no more than 9.5% of household income. This additional employer premium requirement is estimated in the expenditures and the additional appropriation is shown as well. The appropriation for this expenditure is in the OMB budget under Health Insurance Pool - Temporary Employees.

3. **State fiscal effect detail:** *For information shown under state fiscal effect in 1A, please:*

- A. **Revenues:** *Explain the revenue amounts. Provide detail, when appropriate, for each revenue type and fund affected and any amounts included in the executive budget.*

- B. **Expenditures:** *Explain the expenditure amounts. Provide detail, when appropriate, for each agency, line item, and fund affected and the number of FTE positions affected.*

This expenditure is in the executive budget. The intent language is in HB1015 Section 7.

- 
- C. **Appropriations:** *Explain the appropriation amounts. Provide detail, when appropriate, for each agency and fund affected. Explain the relationship between the amounts shown for expenditures and appropriations. Indicate whether the appropriation is also included in the executive budget or relates to a continuing appropriation.*

The appropriation for this expenditure is in the OMB budget under Health Insurance Pool - Temporary Employees.

**Name:** Sparb Collins

**Agency:** NDPERS

**Telephone:** 701-328-3901

**Date Prepared:** 01/02/2013



Date: 2/21/13  
 Roll Call Vote #: 1

**2013 HOUSE STANDING COMMITTEE  
 ROLL CALL VOTES  
 BILL/RESOLUTION NO. 1059**

House Appropriations Committee

Check here for Conference Committee

Legislative Council Amendment Number \_\_\_\_\_

Action Taken:  Do Pass  Do Not Pass  Amended  Adopt Amendment  
 Rerefer to Appropriations  Reconsider

Motion Made By Rep. Thoreson Seconded By Rep. Sanford

Representatives	Yes	No	Representatives	Yes	No
Chairman Delzer		X	Rep. Streyle		X
Vice Chairman Kempenich		X	Rep. Thoreson	X	
Rep. Bellew		X	Rep. Wieland		X
Rep. Brandenburg		X			
Rep. Dosch		X			
Rep. Grande		X	Rep. Boe	X	
Rep. Hawken	X		Rep. Glassheim	X	
Rep. Kreidt		X	Rep. Guggisberg	X	
Rep. Martinson		X	Rep. Holman	X	
Rep. Monson	X		Rep. Williams	X	
Rep. Nelson	X				
Rep. Pollert		X			
Rep. Sanford	X				
Rep. Skarphol		X			

Total Yes 10 No 12

Absent 0

Floor Assignment \_\_\_\_\_

If the vote is on an amendment, briefly indicate intent:

Date: 2/21/13  
 Roll Call Vote #: 2

**2013 HOUSE STANDING COMMITTEE  
 ROLL CALL VOTES  
 BILL/RESOLUTION NO. 1059**

House Appropriations Committee

Check here for Conference Committee

Legislative Council Amendment Number \_\_\_\_\_

Action Taken:  Do Pass  Do Not Pass  Amended  Adopt Amendment  
 Rerefer to Appropriations  Reconsider

Motion Made By Rep. Kempenich Seconded By Rep. Brandenburg

Representatives	Yes	No	Representatives	Yes	No
Chairman Delzer		X	Rep. Streyle	X	
Vice Chairman Kempenich	X		Rep. Thoreson		X
Rep. Bellew	X		Rep. Wieland	X	
Rep. Brandenburg	X				
Rep. Dosch	X				
Rep. Grande	X		Rep. Boe		X
Rep. Hawken		X	Rep. Glassheim		X
Rep. Kreidt	X		Rep. Guggisberg		X
Rep. Martinson	X		Rep. Holman		X
Rep. Monson		X	Rep. Williams		X
Rep. Nelson		X			
Rep. Pollert	X				
Rep. Sanford		X			
Rep. Skarphol	X				

Total Yes 11 No 11

Absent 0

Floor Assignment \_\_\_\_\_

If the vote is on an amendment, briefly indicate intent:

Date: 2/21/13  
 Roll Call Vote #: 3

**2013 HOUSE STANDING COMMITTEE  
 ROLL CALL VOTES  
 BILL/RESOLUTION NO. 1059**

House Appropriations Committee

Check here for Conference Committee

Legislative Council Amendment Number \_\_\_\_\_

Action Taken:  Do Pass  Do Not Pass  Amended  Adopt Amendment  
 Rerefer to Appropriations  Reconsider

Motion Made By Rep. Nelson Seconded By Rep. Monson

Representatives	Yes	No	Representatives	Yes	No
Chairman Delzer	X		Rep. Streyle		X
Vice Chairman Kempenich		X	Rep. Thoreson	X	
Rep. Bellew		X	Rep. Wieland		X
Rep. Brandenburg		X			
Rep. Dosch		X			
Rep. Grande		X	Rep. Boe	X	
Rep. Hawken	X		Rep. Glassheim	X	
Rep. Kreidt		X	Rep. Guggisberg	X	
Rep. Martinson	X		Rep. Holman	X	
Rep. Monson	X		Rep. Williams	X	
Rep. Nelson	X				
Rep. Pollert		X			
Rep. Sanford	X				
Rep. Skarphol	X				

Total Yes 13 No 9

Absent 0

Floor Assignment Rep. Nelson

If the vote is on an amendment, briefly indicate intent:

**REPORT OF STANDING COMMITTEE**

**HB 1059, as engrossed: Appropriations Committee (Rep. Delzer, Chairman)**  
recommends **DO PASS** (13 YEAS, 9 NAYS, 0 ABSENT AND NOT VOTING).  
Engrossed HB 1059 was placed on the Eleventh order on the calendar.

**2013 SENATE GOVERNMENT AND VETERANS AFFAIRS**

**HB 1059**

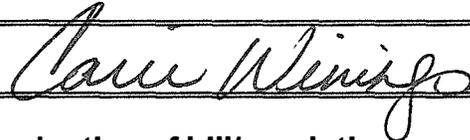
# 2013 SENATE STANDING COMMITTEE MINUTES

Senate Government and Veterans Affairs Committee  
Missouri River Room, State Capitol

HB 1059  
03/13/2013  
Job Number 19926

Conference Committee

Committee Clerk Signature



## Explanation or reason for introduction of bill/resolution:

A BILL for an Act to amend and reenact sections 54-52.1-03.1, 54-52.1-03.4, and 54-52.1-18 of the North Dakota Century Code, relating to withdrawal of a political subdivision from the uniform group insurance program, 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.

## Minutes:

**Chairman Dever:** Opened the hearing on HB 1059.

**Sparb Collins, Executive Director, North Dakota Public Retirement System:** See Attachment #1 for testimony in support of the bill.

**(9:15) Chairman Dever:** Political subdivisions contributions to the HSA are intended to cover their entire cost so the state does not have any obligation.

**Sparb Collins:** Underneath this and the political subdivision would make its own decision on what amount they want to contribute to employee's HSA. That would be set up indirectly by that political subdivision. We would not have to be directly involved in that loop. All we would offer to them is the high deductible health insurance plan product and then they can make the decisions on the rest.

(No other testimony was presented.)

**Chairman Dever:** Closed the hearing in HB 1059.

# 2013 SENATE STANDING COMMITTEE MINUTES

Senate Government and Veterans Affairs Committee  
Missouri River Room, State Capitol

HB 1059  
03/22/2013  
Job Number 20373

Conference Committee

Committee Clerk Signature



## Minutes:

**Chairman Dever:** Opened HB 1059 for committee discussion. There is a million dollar fiscal note on this and it is an appropriation in the OMB budget. I am assuming that we need to re-refer this but it is the policy that goes together with that.

**Senator Nelson:** I have in my notes that the "may require" - we are not sure that it does and that these political subdivisions there is a 60 month vesting period. Some of these political subs may not have even been in the fund that long and they might have to pay back into the fund to satisfy that. I don't know. If they weren't eligible under our plan and had to pull out again, what would we do about the assumptions that were made? That is why section one is there to waive any penalties against state law if the move is required.

**Chairman Dever:** My understanding of this bill is that we are talking about temporary employees and we are not talking about part time employees. We have a lot of employees that are hired on a temporary basis and do not receive benefits otherwise. Under the Affordable Care Act, my understanding is if they are employed for more than 90 or 120 days that health insurance is required. The reason I am thinking that is because I recall a conversation at one point that when agencies hire employees for the summer they are not required to pay health insurance because there is that timeframe.

**Senator Nelson:** Sparb says that safe harbor is in the bill.

**Chairman Dever:** My sense is that the bill is necessary because of the changes in the Affordable Care Act. The question is whether or not it is put together in the proper manner and I don't have any reason to believe otherwise.

**Senator Nelson:** I would think that Sparb usually tends to be quite cautious and I think that is why he has worded things the way he has. He tends to estimate on the conservative side.

**Vice Chairman Berry:** The last paragraph of his testimony is a key piece of this that we are all still waiting for and that is where it mentions that legislative employee's benefits committee gave it no recommendation and basically that was because they felt additional information would be available at a later date. I am not sure what further information that is pertinent that we have now that they did not have then.

**Chairman Dever:** PPACA is three years old tomorrow and the rules are not done yet.

**Senator Nelson:** (Comments on how thorough Sparb has been in his testimony. ) I think there are going to be some federal rules coming down and this bill will make us applicable too so they don't have to come back to employee benefits and ask for a temporary fix till the next time.

**Senator Nelson: Moved a Do Pass and Re-Refer to Appropriations.**

**Senator Marcellais: Seconded.**

**A Roll Call Vote Was Taken: 6 yeas, 1 nay, 0 absent.**

**Senator Nelson: Carrier.**

**FISCAL NOTE**  
**Requested by Legislative Council**  
**01/28/2013**

Revised  
 Amendment to: HB 1059

- 1 A. **State fiscal effect:** *Identify the state fiscal effect and the fiscal effect on agency appropriations compared to funding levels and appropriations anticipated under current law.*

	2011-2013 Biennium		2013-2015 Biennium		2015-2017 Biennium	
	General Fund	Other Funds	General Fund	Other Funds	General Fund	Other Funds
Revenues	\$0	\$0	\$0	\$0	\$0	\$0
Expenditures	\$0	\$0	\$1,000,000	\$1,000,000	\$1,000,000	\$1,000,000
Appropriations	\$0	\$0	\$0	\$0	\$0	\$0

- 1 B. **County, city, school district and township fiscal effect:** *Identify the fiscal effect on the appropriate political subdivision.*

	2011-2013 Biennium	2013-2015 Biennium	2015-2017 Biennium
Counties	\$0	\$0	\$0
Cities	\$0	\$0	\$0
School Districts	\$0	\$0	\$0
Townships	\$0	\$0	\$0

- 2 A. **Bill and fiscal impact summary:** *Provide a brief summary of the measure, including description of the provisions having fiscal impact (limited to 300 characters).*

The fiscal implications in this bill relate to adjusting the definition of temporary employees and their premium payments to comply with the shared responsibility provisions of the Affordable Care Act (ACA).

- B. **Fiscal impact sections:** *Identify and provide a brief description of the sections of the measure which have fiscal impact. Include any assumptions and comments relevant to the analysis.*

Section 1 of the bill would change the definition of temporary employee to comply with the definition requirement to meet the shared responsibility requirement of the Affordable Care Act (ACA) and to avoid any penalties for non-compliance. Pursuant to the ACA, these employees can be charged no more than 9.5% of household income. This additional employer premium requirement is estimated in the expenditures and the additional appropriation is shown as well. The appropriation for this expenditure is in the OMB budget under Health Insurance Pool - Temporary Employees.

3. **State fiscal effect detail:** *For information shown under state fiscal effect in 1A, please:*

- A. **Revenues:** *Explain the revenue amounts. Provide detail, when appropriate, for each revenue type and fund affected and any amounts included in the executive budget.*

- B. **Expenditures:** *Explain the expenditure amounts. Provide detail, when appropriate, for each agency, line item, and fund affected and the number of FTE positions affected.*

This expenditure is in the executive budget. The intent language is in HB1015 Section 7.

- C. **Appropriations:** *Explain the appropriation amounts. Provide detail, when appropriate, for each agency and fund affected. Explain the relationship between the amounts shown for expenditures and appropriations. Indicate whether the appropriation is also included in the executive budget or relates to a continuing appropriation.*

The appropriation for this expenditure is in the OMB budget under Health Insurance Pool - Temporary Employees.

**Name:** Sparb Collins

**Agency:** NDPERS

**Telephone:** 701-328-3901

**Date Prepared:** 01/02/2013

**FISCAL NOTE**  
**Requested by Legislative Council**  
**12/20/2012**

Bill/Resolution No.: HB 1059

- 1 A. **State fiscal effect:** *Identify the state fiscal effect and the fiscal effect on agency appropriations compared to funding levels and appropriations anticipated under current law.*

	2011-2013 Biennium		2013-2015 Biennium		2015-2017 Biennium	
	General Fund	Other Funds	General Fund	Other Funds	General Fund	Other Funds
Revenues	\$0	\$0	\$0	\$0	\$0	\$0
Expenditures	\$0	\$0	\$1,000,000	\$1,000,000	\$1,000,000	\$1,000,000
Appropriations	\$0	\$0	\$0	\$0	\$0	\$0

- 1 B. **County, city, school district and township fiscal effect:** *Identify the fiscal effect on the appropriate political subdivision.*

	2011-2013 Biennium	2013-2015 Biennium	2015-2017 Biennium
Counties	\$0	\$0	\$0
Cities	\$0	\$0	\$0
School Districts	\$0	\$0	\$0
Townships	\$0	\$0	\$0

- 2 A. **Bill and fiscal impact summary:** *Provide a brief summary of the measure, including description of the provisions having fiscal impact (limited to 300 characters).*

The fiscal implications in this bill relate to adjusting the definition of temporary employees and their premium payment to comply with the shared responsibility provisions of the Affordable Care Act(ACA).

- B. **Fiscal impact sections:** *Identify and provide a brief description of the sections of the measure which have fiscal impact. Include any assumptions and comments relevant to the analysis.*

Section 1 of the bill would change the definition of temporary employee to comply with the definition requirement to meet the shared responsibility requirement of the Affordable Care Act (ACA) and to avoid any penalties for non-compliance. Pursuant to the ACA these employees can be charged no more than 9.5% of household income. This additional employer premium requirement is estimated in the expenditures and the additional appropriation is shown as well. The appropriation for this expenditure is in the OMB budget under Health Insurance Pool - Temporary Employees.

3. **State fiscal effect detail:** *For information shown under state fiscal effect in 1A, please:*

- A. **Revenues:** *Explain the revenue amounts. Provide detail, when appropriate, for each revenue type and fund affected and any amounts included in the executive budget.*

- B. **Expenditures:** *Explain the expenditure amounts. Provide detail, when appropriate, for each agency, line item, and fund affected and the number of FTE positions affected.*

This expenditure is in the executive budget. The intent language is in HB1015 Section 7.

- 
- C. **Appropriations:** *Explain the appropriation amounts. Provide detail, when appropriate, for each agency and fund affected. Explain the relationship between the amounts shown for expenditures and appropriations. Indicate whether the appropriation is also included in the executive budget or relates to a continuing appropriation.*

The appropriation for this expenditure is in the OMB budget under Health Insurance Pool - Temporary Employees.

**Name:** Sparb Collins

**Agency:** NDPERS

**Telephone:** 701-328-3901

**Date Prepared:** 01/02/2013



Date: 3/22

Roll Call Vote #: 1

2013 SENATE STANDING COMMITTEE  
ROLL CALL VOTES

BILL/RESOLUTION NO. 1059

Senate Government and Veterans Affairs Committee

Check here for Conference Committee

Legislative Council Amendment Number \_\_\_\_\_

Action Taken:  Do Pass  Do Not Pass  Amended  Adopt Amendment  
 Rerefer to Appropriations  Reconsider

Motion Made By Senator Nelson Seconded By Senator Marcellais

Senators	Yes	No	Senator	Yes	No
Chairman Dick Dever	✓		Senator Carolyn Nelson	✓	
Vice Chairman Spencer Berry		✓	Senator Richard Marcellais	✓	
Senator Dwight Cook	✓				
Senator Donald Schaible	✓				
Senator Nicole Poolman	✓				

Total (Yes) 6 No 1

Absent 0

Floor Assignment Senator Nelson

If the vote is on an amendment, briefly indicate intent:

**REPORT OF STANDING COMMITTEE**

**HB 1059, as engrossed: Government and Veterans Affairs Committee (Sen. Dever, Chairman) recommends DO PASS and BE REREFERRED to the Appropriations Committee (6 YEAS, 1 NAYS, 0 ABSENT AND NOT VOTING). Engrossed HB 1059 was rereferred to the Appropriations Committee.**

**2013 SENATE APPROPRIATIONS**

**HB 1059**

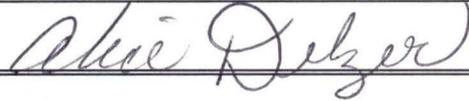
# 2013 SENATE STANDING COMMITTEE MINUTES

## Senate Appropriations Committee Harvest Room, State Capitol

HB 1059  
03-28-2013  
Job # 20603

Conference Committee

Committee Clerk Signature



### Explanation or reason for introduction of bill/resolution:

A BILL to modify the uniform group insurance program eligibility rules for temporary employees

### Minutes:

See attached testimony.

**Chairman Holmberg** called the committee to order on Thursday, March 28, 2013 at 10:00 am in regards to HB 1059. All committee members were present except Senator Warner and Senator O'Connell.

Becky J. Keller- Legislative Council  
Laney Herauf - OMB

**Sparb Collins, Executive Director of NDPERS** testified in favor of HB 1059 and provided Testimony attached # 1 in support of HB 1059. (7.03)

**Pam Sharp, OMB:** I would encourage you once again to add the funding to the OMB's bill for the health insurance for the temporary employees. We will be required to comply with the federal law no matter what so we are going to put our agencies in a difficult position and the state in a difficult position if have requirements and no funding.

**Chairman Holmberg:** If we did not pass the bill, what would be the result to the agencies?

**Ms. Sharp:** We still need to comply with the federal requirements.

**Chairman Holmberg:** So that's first, and then secondly we have to pay for it. But we have no option as far as 1059. If we don't comply they will make us comply.

**Mr. Collins:** We would be subject to penalties. The 1<sup>st</sup> penalty for not providing coverage is \$2000 times the number of full time employees. The second penalty is by charging too much, and that's \$3000 per instance. And this penalty would accrue to the employer, it wouldn't accrue to the PERS plan but to the employer.

**Senator Wanzek:** If we don't cover this group, we are not just penalized on the uncovered ones, we are penalized on all?

**Mr. Collins:** if you don't provide the coverage it's \$2000 times all the employees that would meet the definition. The second is only for each instance, so I would be each individual. This is an evolving situation; more rules are coming out all the time.

**Senator Gary Lee:** (9.57) If we didn't pass this it doesn't mean they are not covered does it? It just means that the money isn't there.

**Mr. Collins:** If it is not passed, under state law, we would not be able to offer coverage to these additional people because the state definition is a little more a narrow who some of these people are and then secondly we wouldn't have the authority to pay the required premium for those additional people. That required premium is 9½ %. It can't be more than 9 ½ % of their household income.

**Senator Gary Lee:** The language indicates needs to be there to say we can do the process of getting them covered, but the money, if that wasn't there, you'd find it somewhere else?

**Ms. Sharp:** In the governor's budget proposal we put \$2M pool in the OMB's budget, \$1M of general funds, \$1M of special funds and we believe this would be adequate to cover all of state government and higher ed. But we do believe that if we do not have this pool agencies are not going to be able to find that within their budget to pay for the temporary health insurance.

**Chairman Holmberg:** (11.35) Whether we like the Affordable Care Act or don't like it, it is the law.

**Ms. Sharp:** It is the law. It would put the state and the agencies in a difficult position if they don't have any means or any funding for this.

**Vice Chairman Bowman:** Is every state complying with this?

**Ms. Sharp:** Every state would be required as North Dakota is. I am not sure how other states are handling it.

**Senator Kilzer:** About the health savings account which traditionally had been a high deductible and a cheaper premium for people, hasn't that been changed by this Obama Care and has that all the preventive services and things that are mandated in the new law, that is going to change that quite a bit isn't it, so that the health savings account in the future in the next year or two is going to be a lot different from what it has been in the past? So the term "Health Savings Account" is going to be different, is that right?

**Mr. Collins:** (13.04) What the law did provide is that there is expanded coverage required for wellness benefits and has already been integrated in the high deductible health insurance plan. That plan already includes those additional provisions, we had to comply with that last time, and we did. So that's been added in. Now for the main PERS plan, the non-high deductible plan, that plan is grandfathered underneath the law, and we don't have any in that plan, so if we lost our grandfathered status, then we would have to add that in.

In the high deductible plan we complied with everything we know that we had to comply with on the plan side, we should be ok there.

**Senator Kilzer:** At an added cost, of course.

**Mr. Collins:** Yes, that is why we lost our grandfathered status in the main plan, to comply there was 1 ½ to 2% more a premium if we lost our grandfathered status for these additional benefits.

**Senator Krebsbach:** I noticed the penalty is for \$2000 per FTE per year. How many years could this go on?

**Mr. Collins:** As long as you didn't comply. If you didn't comply at the end of the first year, you'd be subject to it the second year, if you didn't comply you would be subject to it after that. The rules are continuing to come.

**Chairman Holmberg** closed the hearing on HB 1059.

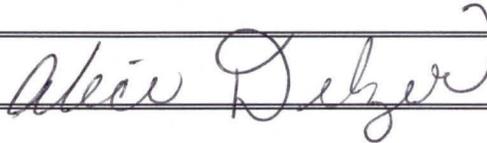
# 2013 SENATE STANDING COMMITTEE MINUTES

## Senate Appropriations Committee Harvest Room, State Capitol

HB 1059  
03-28-2013  
Job # 20619

Conference Committee

Committee Clerk Signature



### Explanation or reason for introduction of bill/resolution:

A BILL to modify the uniform group insurance program eligibility rules for temporary employees

### Minutes:

You may make reference to "attached testimony."

**Chairman Holmberg** called the committee to order on Thursday, March 28, 2013 at 11:00 am. All committee members were present except Senator Warner and Senator O'Connell.

Becky J. Keller- Legislative Council  
Laney Herauf- OMB

**Senator Krebsbach moved a do pass. 2<sup>nd</sup> by Senator Robinson.**

**Chairman Holmberg:** Call the roll on a Do Pass on HB 1059.

**A Roll Call vote was taken. Yea: 9; Nay: 2; Absent: 2.**

**Chairman Holmberg:** This goes back to GVA. **Senator Nelson will carry the bill.**

The hearing was closed on HB 1059.

**FISCAL NOTE**  
**Requested by Legislative Council**  
**01/28/2013**

Revised  
 Amendment to: HB 1059

- 1 A. **State fiscal effect:** *Identify the state fiscal effect and the fiscal effect on agency appropriations compared to funding levels and appropriations anticipated under current law.*

	2011-2013 Biennium		2013-2015 Biennium		2015-2017 Biennium	
	General Fund	Other Funds	General Fund	Other Funds	General Fund	Other Funds
Revenues	\$0	\$0	\$0	\$0	\$0	\$0
Expenditures	\$0	\$0	\$1,000,000	\$1,000,000	\$1,000,000	\$1,000,000
Appropriations	\$0	\$0	\$0	\$0	\$0	\$0

- 1 B. **County, city, school district and township fiscal effect:** *Identify the fiscal effect on the appropriate political subdivision.*

	2011-2013 Biennium	2013-2015 Biennium	2015-2017 Biennium
Counties	\$0	\$0	\$0
Cities	\$0	\$0	\$0
School Districts	\$0	\$0	\$0
Townships	\$0	\$0	\$0

- 2 A. **Bill and fiscal impact summary:** *Provide a brief summary of the measure, including description of the provisions having fiscal impact (limited to 300 characters).*

The fiscal implications in this bill relate to adjusting the definition of temporary employees and their premium payments to comply with the shared responsibility provisions of the Affordable Care Act (ACA).

- B. **Fiscal impact sections:** *Identify and provide a brief description of the sections of the measure which have fiscal impact. Include any assumptions and comments relevant to the analysis.*

Section 1 of the bill would change the definition of temporary employee to comply with the definition requirement to meet the shared responsibility requirement of the Affordable Care Act (ACA) and to avoid any penalties for non-compliance. Pursuant to the ACA, these employees can be charged no more than 9.5% of household income. This additional employer premium requirement is estimated in the expenditures and the additional appropriation is shown as well. The appropriation for this expenditure is in the OMB budget under Health Insurance Pool - Temporary Employees.

3. **State fiscal effect detail:** *For information shown under state fiscal effect in 1A, please:*

- A. **Revenues:** *Explain the revenue amounts. Provide detail, when appropriate, for each revenue type and fund affected and any amounts included in the executive budget.*

- B. **Expenditures:** *Explain the expenditure amounts. Provide detail, when appropriate, for each agency, line item, and fund affected and the number of FTE positions affected.*

This expenditure is in the executive budget. The intent language is in HB1015 Section 7.

- C. **Appropriations:** *Explain the appropriation amounts. Provide detail, when appropriate, for each agency and fund affected. Explain the relationship between the amounts shown for expenditures and appropriations. Indicate whether the appropriation is also included in the executive budget or relates to a continuing appropriation.*

The appropriation for this expenditure is in the OMB budget under Health Insurance Pool - Temporary Employees.

**Name:** Sparb Collins

**Agency:** NDPERS

**Telephone:** 701-328-3901

**Date Prepared:** 01/02/2013

**FISCAL NOTE**  
**Requested by Legislative Council**  
**12/20/2012**

Bill/Resolution No.: HB 1059

- 1 A. **State fiscal effect:** *Identify the state fiscal effect and the fiscal effect on agency appropriations compared to funding levels and appropriations anticipated under current law.*

	2011-2013 Biennium		2013-2015 Biennium		2015-2017 Biennium	
	General Fund	Other Funds	General Fund	Other Funds	General Fund	Other Funds
Revenues	\$0	\$0	\$0	\$0	\$0	\$0
Expenditures	\$0	\$0	\$1,000,000	\$1,000,000	\$1,000,000	\$1,000,000
Appropriations	\$0	\$0	\$0	\$0	\$0	\$0

- 1 B. **County, city, school district and township fiscal effect:** *Identify the fiscal effect on the appropriate political subdivision.*

	2011-2013 Biennium	2013-2015 Biennium	2015-2017 Biennium
Counties	\$0	\$0	\$0
Cities	\$0	\$0	\$0
School Districts	\$0	\$0	\$0
Townships	\$0	\$0	\$0

- 2 A. **Bill and fiscal impact summary:** *Provide a brief summary of the measure, including description of the provisions having fiscal impact (limited to 300 characters).*

The fiscal implications in this bill relate to adjusting the definition of temporary employees and their premium payment to comply with the shared responsibility provisions of the Affordable Care Act(ACA).

- B. **Fiscal impact sections:** *Identify and provide a brief description of the sections of the measure which have fiscal impact. Include any assumptions and comments relevant to the analysis.*

Section 1 of the bill would change the definition of temporary employee to comply with the definition requirement to meet the shared responsibility requirement of the Affordable Care Act (ACA) and to avoid any penalties for non-compliance. Pursuant to the ACA these employees can be charged no more than 9.5% of household income. This additional employer premium requirement is estimated in the expenditures and the additional appropriation is shown as well. The appropriation for this expenditure is in the OMB budget under Health Insurance Pool - Temporary Employees.

3. **State fiscal effect detail:** *For information shown under state fiscal effect in 1A, please:*

- A. **Revenues:** *Explain the revenue amounts. Provide detail, when appropriate, for each revenue type and fund affected and any amounts included in the executive budget.*

- B. **Expenditures:** *Explain the expenditure amounts. Provide detail, when appropriate, for each agency, line item, and fund affected and the number of FTE positions affected.*

This expenditure is in the executive budget. The intent language is in HB1015 Section 7.

- 
- C. **Appropriations:** *Explain the appropriation amounts. Provide detail, when appropriate, for each agency and fund affected. Explain the relationship between the amounts shown for expenditures and appropriations. Indicate whether the appropriation is also included in the executive budget or relates to a continuing appropriation.*

The appropriation for this expenditure is in the OMB budget under Health Insurance Pool - Temporary Employees.

**Name:** Sparb Collins

**Agency:** NDPERS

**Telephone:** 701-328-3901

**Date Prepared:** 01/02/2013



Date: 3-28-13

Roll Call Vote # 1

**2013 SENATE STANDING COMMITTEE  
ROLL CALL VOTES**

BILL/RESOLUTION NO. 1059

Senate Appropriations Committee

Check here for Conference Committee

Legislative Council Amendment Number \_\_\_\_\_

Action Taken  Adopt Amendment  Do Pass  
 Do Pass as Amended  Do Not Pass

Motion Made By Krebsbach Seconded By Robinson

Senators	Yes	No	Senator	Yes	No
Chairman Ray Holmberg	✓		Senator Tim Mathern	✓	
Co-Vice Chairman Bill Bowman	✓		Senator David O'Connell	a	
Co-Vice Chair Tony Grindberg	✓		Senator Larry Robinson	✓	
Senator Ralph Kilzer	✓		Senator John Warner	a	
Senator Karen Krebsbach	✓				
Senator Robert Erbele	<del>✓</del>	✓			
Senator Terry Wanzek	✓				
Senator Ron Carlisle	✓	✓			
Senator Gary Lee					

Total (Yes) 9 No 2

Absent 2

Floor Assignment 6 VA Nelson

If the vote is on an amendment, briefly indicate intent:

**REPORT OF STANDING COMMITTEE**

**HB 1059, as engrossed: Appropriations Committee (Sen. Holmberg, Chairman)**  
recommends **DO PASS** (9 YEAS, 2 NAYS, 2 ABSENT AND NOT VOTING).  
Engrossed HB 1059 was placed on the Fourteenth order on the calendar.

**2013 TESTIMONY**

**HB 1059**

Attachment 1

## TESTIMONY OF SPARB COLLINS

### HOUSE BILL 1059

Mr. Chairman, members of the committee, good morning my name is Sparb Collins and I am the Executive Director of the North Dakota Public Employees Retirement System. Today I appear before you in support of HB1059. This bill addresses two areas:

1. Compliance with the Affordable Care Act (ACA) (Section 1).
2. Participation by political subdivisions in the PERS High Deductible Health Plan (HDHP) (Section 2).

#### Section 1 - Compliance with the Affordable Care Act (ACA)

Section 1 of the 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 the Employer Shared Responsibility penalties with respect to its temporary employees under the Affordable Care Act. 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.

Section 1 of the 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)]."
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)], ...."

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.

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 technically could expose the State to Employer Shared Responsibility penalties. However, the safe harbors outlined in IRS Notice 2012-58 will allow the State to avoid this problem.

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.

The above changes should insure that the state complies with the shared responsibilities rules without changing our definition of full time employees that are eligible for 100% payment of their health insurance premium. Consequently, the fiscal note on this indicates the estimated cost of this change is \$2,000,000 with 50% coming from the general fund and 50% coming from other funds. This also assumes that the State, as the employer will use a 12 month look-back period for determining eligibility.

### **Section 2 - Political Subdivision Participation in High Deductible Health Plan (HDHP)**

Section 2 of the bill would amend Section 54-52.1-18 of the North Dakota Century Code relating to the high-deductible health plan alternative and clarifies political subdivision participation in the plan. Specifically, it provides 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. Secondly, it allows political subdivisions to directly retain the HSA vendor for its employees. It is felt that these changes will allow this option to operate more efficiently and will facilitate the political subs participation in the HDHP.

Mr. Chairman, members of the committee this bill was reviewed by the Legislative Employee Benefits Committee and given no recommendation. At the time of the Committee's review, they felt that additional information on the ACA would be available at a later date.

Thank you and this concludes my testimony.

Definition of Full time in NDCC	Existing Definition of Temp
<p>members of the legislative assembly, judges of the supreme court, paid members of state or political subdivision boards, commissions, or associations, full-time employees of political subdivisions, elective state officers as defined by subsection 2 of section 54-06-01, and disabled permanent employees who are receiving compensation from the North Dakota workforce safety and insurance fund.</p> <p>As used in this subsection, "permanent employee" <b>means one whose services are not limited in duration, who is filling an approved and regularly funded position in a governmental unit</b>, and who is employed at least seventeen and one-half hours per week and at least five months each year or for those first employed after August 1, 2003, <b>is employed at least twenty hours per week and at least twenty weeks each year of employment.</b></p>	<p>"Temporary employee" means a governmental unit employee who is <b>not filling an approved and regularly funded position</b> in an eligible governmental unit and whose services may or may not be limited in duration</p> <p>A temporary employee employed on or after August 1, 2007, is only eligible to participate in the uniform group insurance program if the employee <b>is employed at least twenty hours per week and at least twenty weeks each</b> year of employment.</p>



1059 Attachment  
1-17-13  
~~1-17-13~~ m 3

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# Memo

Date: February 6, 2012  
To: Sparb Collins, NDPERS  
From: Robert Davis  
Subject: Shared Responsibility Rules

Following is a preliminary assessment of the State of North Dakota's potential exposure to Shared Responsibility payments under the Affordable Care Act ("ACA"). It is based on the current eligibility and premium contribution requirements under the PERS group health plan, as summarized below, and on the relevant provisions of the ACA and related guidance issued as of February 6, 2012.

The Shared Responsibility rules discussed below are effective for months beginning after December 31, 2013. These rules apply to "applicable large employers,"<sup>1</sup> and not to group health plans. As a result, the effective date should not vary according to plan or policy year.

## Current Eligibility Rules and Premium Contributions

The following two classes of employees are eligible to participate in the PERS group health plan:

1. "Eligible Employees" include –
  - a. "permanent employees," defined as employees "whose services are not limited in duration, who is filling an approved and regularly funded position in a governmental unit, and who is employed at least seventeen and one-half hours per week and at least five months each year or for those first employed after August 1, 2003, is employed at least twenty hours per week and at least twenty weeks each year of employment", and
  - b. Members of the legislative assembly, judges of the supreme court, paid members of state or political subdivision boards, commissions, or associations, full-time employees of political subdivisions, certain elective state officers, and disabled permanent employees who are receiving compensation from the North Dakota workforce safety and insurance fund.

<sup>1</sup> The ACA defines "applicable large employer" for a calendar year as any "employer who employed an average of at least 50 full-time employees on business days during the preceding calendar year."



Professional Services means audit, tax, consulting and financial advisory services.

Solely for the information and use of NDPERS and not to be relied upon by any other person or entity

Member of Deloitte Touche Tohmatsu Limited

To: Sparb Collins, NDPERS  
Subject: Shared Responsibility Rules  
Date: February 6, 2012  
Page 2

2. "Temporary Employees" who satisfy the following criteria –
  - a. If employed before August 1, 2007, by completing the necessary enrollment forms and qualifying under the medical underwriting requirements, or
  - b. If employed on or after August 1, 2007, if employed at least 20 hours per week and at least 20 weeks per year.

Eligible Employees do not pay any portion of the premium for PERS group health plan coverage. Temporary Employees generally pay the entire premium for PERS group health plan coverage.

### **Affordable Care Act Shared Responsibility Rules**

The Affordable Care Act's Shared Responsibility rules, effective beginning on January 1, 2014, will impose potential penalties on "applicable large employers" that –

1. fail to offer "minimum essential coverage"<sup>2</sup> 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" for any month is anyone who is employed on average at least 30 hours of service per week during that month. The Shared Responsibility penalty for No Coverage will be \$2,000 per "full-time employee" per year. This penalty will be imposed in these circumstances only if at least one full-time employee purchases coverage in a State Health Insurance Exchange and qualifies for a Premium Tax Credit or Cost-Sharing Reduction. A full-time employee 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 full-time employee who –

1. Opts-out of the State's coverage;
2. Purchases coverage in a State Health Insurance Exchange; and
3. Qualifies for a Premium Tax Credit or Cost-Sharing Reduction.

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<sup>2</sup> 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."

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Subject: Shared Responsibility Rules  
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A full-time employee 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.

### **Potential Exposure to Shared Responsibility Penalties Based on Eligibility Requirements**

There are gaps in the eligibility rules for the PERS group health plan that may expose the State to potential Shared Responsibility penalties. Specifically, Permanent Employees employed less than 5 months per year (or less than 20 weeks per year, if first employed after August 1, 2003) and Temporary Employees employed on or after August 1, 2007 who are employed fewer than 20 weeks per year are not eligible for coverage. However, if any of these employees work an average of 30 hours per week during a month they technically will be treated as full-time employees for that month for purposes of the Shared Responsibility rules. As a result, these individuals may expose the State to Shared Responsibility penalties.

Options for addressing this potential problem include –

- Eliminating the 20 week (or 5 month) per year threshold for Permanent and Temporary Employees to be eligible for coverage;
- Eliminating the 20 week (or 5 month) per year threshold only for Permanent and Temporary Employees working at least 30 hours per week;
- Prohibiting Permanent and Temporary Employees who work fewer than 20 weeks per year from working 30 or more hours per week; or
- Eliminating the distinction between Permanent and Temporary Employees for eligibility purposes and making all employees who are full-time employees as defined in the ACA Act eligible for coverage.

Additional options might become available when the IRS issues guidance on the Shared Responsibility rules. For example, IRS Notice 2011-36 stated Treasury was considering "alternatives to a month-by-month determination of full-time employee status for purposes of calculating an applicable large employer's potential" Shared Responsibility penalty.<sup>3</sup>

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<sup>3</sup> Future guidance also should clarify how the Shared Responsibility rules will apply to employers that offer minimum essential coverage to most, but not all, full-time employees.

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### **Potential Exposure to Shared Responsibility Penalties Based on Premium Contributions**

The State also may be exposed to potential Shared Responsibility penalties with respect to Temporary Employees who are eligible for coverage if their premium contributions will exceed 9.5% of their household incomes. This almost certainly will be the case for at least some Temporary Employees because they pay the full premium cost.

In order to avoid this second potential problem, the State would need to subsidize the premiums for Temporary Employees who are full-time employees (as defined by the ACA) at least to the extent necessary to ensure their required contributions do not exceed 9.5% of their household incomes.

### **Alternative Solution**

In addition to the possible solutions outlined above, another alternative the State may consider would be setting up a plan for all Permanent and Temporary Employees who are full-time employees (as defined by the ACA) that just meets the 60% minimum value threshold. By making all such employees eligible for this plan and providing an adequate premium subsidy the State could avoid both problems. The total cost of this plan would likely be less than the current PERS group health plan because it provides less comprehensive benefits.

cc: Pat Pechacek



THE SEGAL COMPANY - WASHINGTON, DC

1059  
1-17-13  
Attachment 4

## MEMORANDUM

**To:** Sparb Collins, Executive Director  
State of North Dakota Public Employees' Retirement System (PERS)

**From:** Joanne L. Husted

**Date:** March 1, 2012

**Re:** Affordable Care Act's Approach to Shared Responsibility for Employers

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The purpose of this memo is to capture our discussions on February 22 & 24 and provide some additional thoughts about the application of the Affordable Care Act's (ACA's) approach to shared responsibility in the context of the State of North Dakota's health plan. Your primary question is whether the State should change how it defines which employees are eligible for health coverage in order to avoid (or minimize) the ACA's shared responsibility penalty (referred to here as the "free-rider penalty").

As guide posts we have the statutory language, one proposed regulation on the premium assistance tax credit, and three notices from the Department of the Treasury. The three notices (Treasury Notice 2011-36, Notice 2011-73, and Notice 2012-17<sup>1</sup>) are the most helpful, but they were primarily issued for the purpose of soliciting comments on various approaches Treasury is contemplating and do not constitute official guidance. While we are glad to provide our analysis based upon what we know or surmise so far, you should rely on legal counsel for authoritative advice on the interpretation of laws and regulations and their application to specific facts.

### Background Information on the State's Plan

You explained that the State offers health coverage on an insured basis to all employees and their families in the following two categories (Group 1 and Group 2). The key difference between these two categories lies in whether the State pays for the coverage or the employee pays for the coverage:

- **Group 1 – "Eligible Employees":** The State pays the full premium cost for employees (and their families) who are in Group 1. Group 1 consists of "permanent employees," as defined

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These notices are available at: <http://www.irs.gov/pub/irs-drop/n-11-36.pdf> (Notice 2011-36), <http://www.irs.gov/pub/irs-drop/n-11-73.pdf> (Notice 2011-73), and <http://www.irs.gov/pub/irs-drop/n-12-17.pdf> (Notice 2012-17, in form of answers to frequently asked questions).

by North Dakota statute. That definition includes a requirement that the individual work 20 hours/week for five or more months/year. Some of these employees do not actually work full time, but they are treated as full time and are eligible for coverage that is fully paid for by the State. Group 1 also includes members of the legislature, judges of the supreme court, and other types of employees listed in the statute.

Employees who fall within Group 1 are identified as “Eligible Employees” when they are hired, and are eligible for fully paid health coverage at the start of the first month after they begin employment. They are not required to wait until they work for five months before they can enroll in the plan.

- **Group 2 – “Temporary Employees”:** This group includes temporary employees who were hired before August 1, 2007. It also includes employees hired on or after August 1, 2007 who work at least 20 hours/week and at least 20 weeks/year. For this Group 2, the State does not contribute to the cost of coverage. Group 2 employees may purchase coverage through the State’s plan by paying the full premium cost for themselves and their families. In some cases, the employee’s employer may elect to pay some or all of the cost of this coverage, but PERS is not informed when this happens.

Employees who fall within Group 2 are identified as “Temporary Employees” when they are hired, and are eligible to buy health coverage as of the start of the first month after they are hired. Like Group 1, they are not required to work for 20 weeks before they can enroll in the plan.

There is another group of temporary employees – those who are hired to fill positions that do not meet the service requirement of 20 hours/week and 20 weeks/per year – who are not eligible to buy health coverage from the State. This group – **Group 3** – could include employees who actually work on average 30 hours per week.

### **Brief Conclusion**

#### Minimize Free-Rider Penalty:

1. To minimize liability under the free-rider penalty, the State of North Dakota may want to consider making employees in **Group 3** eligible to purchase health coverage at their own cost. This would be especially important to do if Group 3 represents a sizeable percentage of the State’s population of full-time employees.
2. An employer must offer “its full-time employees (and their dependents) the opportunity to enroll in minimum essential coverage” in order to qualify for more favorable treatment under the free-rider penalty (i.e., paying \$3,000 for each full-time employee who actually obtains the federal premium assistance tax credit). If Treasury determines that who pays for the premium under the employer’s plan is relevant in determining whether an employer makes such an offer, the State may want to consider paying some of the premium for full-time employees in **Group 2** and **Group 3**.
3. The State can also minimize its liability under the free-rider penalty by ensuring that its health coverage is affordable for all of its employees in **Group 2** and **Group 3** who work

full time under the 30 hours/week standard set by the ACA. You indicated that the State might do this by contributing to the cost of coverage for some of these employees. Many employers pay for a greater portion of the coverage provided to lower-income employees compared to higher-income employees, but salary-based differentials, as well as an employer's contribution strategy generally, should be reviewed under applicable nondiscrimination rules, including the ACA provision (new Section 2716 of the Public Health Service Act<sup>2</sup>) that applies rules similar to the nondiscrimination rules in Internal Revenue Code (IRC) §105(h) rules to insured plans that are not grandfathered plans.<sup>3</sup>

#### Other Considerations:

Making the coverage "affordable" enough to avoid the free-rider penalty might not benefit some Group 2 and Group 3 employees as much as the State intends. Some of these employees might be better off financially if they obtained subsidized coverage in the State's exchange. This might be especially true for their family members, because they might not be able to obtain subsidized coverage in the exchange if the State only makes the premium for employee-only coverage affordable.

#### The Free-Rider Penalty and its Application to North Dakota

The ACA includes a free-rider penalty that is designed to encourage large employers to offer health coverage to their full-time employees. For purposes of this penalty, an employee is considered a full-time employee if he or she is employed on average at least 30 hours per week.<sup>4</sup> This definition applies to all aspects of the operation of the free-rider penalty.

Here is an overview of this penalty:

- The penalty applies to an employer with at least 50 full-time employees. To determine if the employer meets this threshold, hours worked by part-time employees are aggregated to determine full-time equivalents.

**Comment:** If the employer is the State of North Dakota as a whole, it would surely meet this threshold, and the penalty would apply if triggered. However, there may be political subdivisions or separate agencies that would be treated as the "employer" in some cases, and some of those employers might not employ enough employees to meet the threshold.<sup>5</sup>

- The penalty is triggered only if the employer has at least one full-time employee (as defined by the ACA) who goes into the State's health insurance exchange and obtains a federal subsidy (either a premium assistance tax credit subsidy to help buy the coverage or a subsidy in the form of cost-sharing assistance).

<sup>2</sup> Under Treasury Notice 2011-1, compliance with Section 2716 will not be required until final regulations (or other administrative guidance) are issued.

<sup>3</sup> A grandfathered plan is one that was in existence on March 23, 2010 and that does not change its plan design in certain ways. A plan that makes certain design changes (such as increasing employees' coinsurance) loses its status as a grandfathered plan and must comply with additional ACA requirements.

The Treasury Department is likely to treat 130 hours per month as the equivalent of 30 hours per week. While we are aware of one legal challenge to the applicability of the free-rider penalty to governmental employers, the U.S. Supreme Court has not agreed to take up this issue.

➤ Generally, an employee who is eligible for group health plan coverage (whether working full time or part time) will not be able to obtain these federal subsidies. However, there are two exceptions to this general rule. An employee with household income under 400% of the Federal Poverty Level (currently \$92,200 for a family of four) will qualify for the premium assistance subsidy if that group health plan coverage is either unaffordable or does not provide minimum value.

1. The coverage is considered **unaffordable** if the employee's cost for self-only coverage is more than 9.5% of the employee's household income.<sup>6</sup> Treasury is expected to provide a safe harbor that would allow an employer to avoid the free-rider penalty if the employee's cost for self-only coverage does not exceed 9.5% of the employee's W-2 wages (Box 1). (The employee's eligibility for the premium assistance tax credit would still be based on household income.)

**Comment:** As we discussed, for some of North Dakota's Group 2 employees (all of whom pay 100% of the premium for coverage), the coverage would be considered unaffordable even under the safe harbor, because they earn relatively low wages.

2. The coverage does not provide **minimum value** if the plan pays less than 60% of expected claims costs.

**Comment:** You indicated that you have no concerns about the coverage failing to meet this 60% test.

➤ How the penalty is calculated depends on whether the employer offers "its full-time employees (and their dependents) the opportunity to enroll in minimum essential coverage." IRC §4980H(a)& (b).

- If the employer does **not** offer this opportunity, the annual penalty is \$2,000 times X, with X equal to the number of full-time employees (as defined in the ACA) minus the first 30. §4980H **subsection (a)**.
- If the employer does offer this opportunity, the annual penalty is \$3,000 times the number of full-time employees who actually receive a federal subsidy. §4980H **subsection (b)**.

**Comment:** It is clearly important for the State to know if its liability would be assessed under subsection (a) or (b), and it would likely be a lower amount if the State's liability were assessed under (b). In Notice 2011-36 (page 18), Treasury states that it contemplates that its "proposed regulations would make clear that an employer offering coverage to all, or substantially all, of its full-time employees would not be subject to the §4980H(a) assessable payment provisions." (Emphasis added.) For this purpose, a full-time employee would be determined by the ACA's standards, not by the employer's definition of full-time employee. See Treasury Notice 2011-36 (page 3).

Notably, Treasury has not indicated whether who pays for the premium will be taken into consideration in determining whether (a) or (b) applies. We do not expect premium

<sup>6</sup> Under a proposed rule, the affordability of coverage for an employee's dependents would be measured by the cost of self-only coverage for the employee. In other words, if self-only coverage is affordable for the employee (costs no more than 9.5% of household income), family members seeking exchange coverage would not be eligible for the subsidy.

contributions (or relative premium contributions) to matter, but this will be important to watch for in the final regulations.

- If who pays for the premium is **not** relevant, then the State's liability would be determined under subsection (b) if Group 1 and Group 2 combined represent substantially all of the State's full-time employees.
- If who pays for the premium is relevant, then the State would be liable under subsection (b) if Group 1 (for whom the State pays the full premium) represents all or substantially all of the State's full-time employees.<sup>7</sup>

A related issue that Treasury has not resolved is whether "minimum essential coverage" in this context means some minimum level of coverage. This is not likely to be an issue for the State of North Dakota, as you have stated that the health coverage is comprehensive.

Another issue that Treasury has not resolved is whether the parenthetical "(and their dependents)" means that the employer must also offer coverage to family members. Again, this is not likely to be an issue for the State of North Dakota, as it offers coverage to the family members of all employees in both Groups 1 and 2.

## Conclusion

I hope this memo is useful to you as you explore the possible impact of the free-rider penalty on the State of North Dakota. At a minimum, the State may want to consider:

- > Making employees in **Group 3** eligible to purchase health coverage at their own cost,
- > Paying some of the premium for employees in **Group 2** and **Group 3** who work on average at least 30 hours per week, and
- > Ensuring that the State's health plan is affordable for all of its employees in **Group 2** and **Group 3** who work on average at least 30 hours per week.

Treasury will likely propose certain look-back and stability periods (not addressed here) that would be used to measure whether an employee will be treated as a full-time employee, and Treasury's approach to categorizing employees, rather than the State's current definitions, will determine how the penalty would apply.

cc: Cathie Eitelberg, Brad Ramirez, Melanie Walker

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<sup>7</sup> This same issue (whether the employer contributes to the premium) could surface in the context of the affordability safe harbor discussed earlier. Notice 2011-73 (page 3) states that Treasury expects to apply certain conditions to this safe harbor, such as a requirement that the employer "offer its full-time employees (and their dependents) the opportunity to enroll in minimum essential coverage under an eligible employer-sponsored plan." Treasury could determine that who pays the premium matters for purposes of the safe harbor. We do not expect this to be the case, but this will be important to watch for in the final regulations. Should the State not be able to avail itself of this safe harbor, the employee's household income would determine the State's liability for the free-rider penalty instead of W-2 wages. This would make it more difficult to predict the State's liability for the penalty and design benefits to avoid it.

## 1. Safe Harbor Enables Employers to Determine “Full-Time” Employees under Affordable Care Act

Notice 2012-58 allows employers to use a safe harbor method – involving a look-back and stability period – for determining which ongoing and newly-hired employees are “full-time” employees for purposes of the employer “shared responsibility provisions” of the Affordable Care Act. An employee’s full-time status based on the look-back period would apply during the following stability period, regardless of the number of hours worked by the employee during the stability period. Employers may rely on the safe harbor through at least the end of 2014.

Beginning in 2014, Code § 4980H imposes an assessable payment, or penalty, on large employers if a full-time employee is certified to receive a premium tax credit or cost-sharing reduction to purchase health insurance through an exchange because the employer failed to offer minimum essential coverage under an employer-sponsored group health plan – or, offered minimum essential coverage that was not affordable (i.e., where the employee’s required contribution was more than 9.5% of household income) or did not provide minimum value (i.e., where the plan’s share of the total allowed costs of the benefits provided is less than 60 percent). Generally, employees whose household income is below 400 percent of the poverty level may qualify for the premium tax credit or cost sharing reduction. The penalty for employers who fail to offer minimum essential coverage altogether is a monthly amount equal to \$166.67 times the number of full-time employees (excluding the first 30) who are employed during the month. The penalty for employers who offer minimum essential coverage that is not affordable or that fails to provide minimum value is a monthly amount equal to \$250 times the number of full-time employees who are certified to receive the tax credit or cost-sharing reduction.

These employer “shared responsibility” provisions make it imperative for *large employers* to know which employees are considered *full time*. Under Code § 4980H an employer is a “large employer” for a calendar year if, during the preceding calendar year, it employed on average at least 50 full-time employees. An employee is a “full-time employee” for any month if he or she was employed, on average, for at least 30 hours of service per week. Special rules apply in making these calculations. See IRS Notice 2011-36.

Newly released IRS Notice 2012-58 provides employers with an optional safe harbor for determining whether employees are “full-time” and can thereby potentially trigger penalties under the employer shared responsibility provisions of Code § 4980H. Slightly different safe harbors are available for ongoing employees and newly hired employees. Both are based upon the concept of a “measurement period” (a look-back period for determining whether the employee is full-time), a “stability period” (a period going forward during which the determination applies) and an “administrative period” (a short period of time between the end of the measurement period and the beginning of the stability period during which the employee’s full-time status is determined and the employee is offered coverage).

### Determining Whether Ongoing Employees Are Full-Time

For ongoing employees, the employer is permitted to determine an employee’s full-time status by looking back over a standard measurement period (Standard Measurement Period) it has designated. A Standard Measurement Period cannot be less than 3 or more than 12 consecutive calendar months. If, based on the Standard Measurement Period, the employee is determined to be full time, a stability period (Stability Period) applies that lasts no less than 6 consecutive calendar months and at least as long as the Standard Measurement Period. During the Stability Period, the employee is considered full-time for

purposes of the employer’s obligation to offer minimum coverage. If the employee is determined not to be full time, the employee is considered not full-time during the following Stability Period – however, in that case, the Stability Period cannot last longer than the Standard Measurement Period (i.e., the 6 month minimum does not apply). The employer must apply these periods on a uniform and consistent basis to all employees within a designated category. Permissible categories of employees include collectively-bargained, non-collectively-bargained, hourly, salaried, employees in different states, employees employed by different entities, etc.

To allow time to make the determination and notify and enroll employees who are determined to be full time, the employer may utilize an administrative period (Administrative Period) after the Standard Measurement Period and before the Stability Period. The Administrative Period cannot exceed 90 days, and cannot be used to create gaps in coverage. Employees covered under the plan as full-time employees immediately prior to the Administrative Period (based on a prior Standard Measurement Period) would continue to be covered during the Administrative Period.

<b>“Full-Time Employee” Determination Safe Harbor Design for Ongoing Employees</b>	
Period	Limitations
<b>Standard Measurement Period</b>	At least 3 but not more than 12 consecutive calendar months
<b>Administrative Period</b>	Up to 90 days after the close of the Standard Measurement Period
<b>Stability Period</b>	For employees <u>determined to be full-time</u> , at least 6 consecutive calendar months and no shorter than the Standard Measurement Period.  For employees <u>determined not to be full-time</u> , no longer than the Standard Measurement Period.

Notice 2012-58 provides an example of a safe harbor design for ongoing employees where the employer uses a 12-month Stability Period that is the calendar year, and a 12-month Standard Measurement Period that runs from October 15 through October 14 of the following year. An Administrative Period runs, for less than the maximum 90-day period, from October 15 to December 31. During the Administrative Period the employer looks back to determine which employees were employed, on average, for at least 30 hours of service per week during the Standard Measurement Period. Those employees who are covered under the employer’s group health plan on account of an earlier Standard Measurement Period continue to be covered during the Administrative Period (i.e., the Administrative Period overlaps with the prior Stability Period), and any employees determined to be full-time on account of the most recent ended Standard Measurement Period will be offered coverage effective January 1, and will be considered full-time employees for the following Stability Period.

Can this safe harbor be applied to all employees? There is some lack of clarity. Previously issued Notice 2011-36, which proposed the safe harbor for public comment, explicitly stated that, for “employees who move into full-time status during the year, it is currently anticipated that this safe harbor may apply only in a limited form.” Notice 2012-58 reiterates this concept by stating that “different rules may apply to employees who move into full-time status during the year.” The issue is expected to be addressed in upcoming regulations. For newly hired employees who are reasonably expected to work full time, the Notice explicitly provides that the employer penalty for the failure to offer coverage under Code § 4980H(a) will apply after the first three months of employment (i.e., the

employer only gets a maximum of three calendar months before the penalty will apply with regard to such an employee).

**Determining Whether Newly Hired Employees Are Full-Time**

A similar but distinct safe harbor is available for newly-hired employees who work on a variable-hour or seasonal basis. A variable-hour employee is one for whom it cannot be determined whether a work week of at least 30 hours on average is reasonably expected. The Notice gives an example of a retail worker who is hired to work more than 30 hours per week for the holiday season and is reasonably expected to continue after the holiday season, but is not reasonably expected to work at least 30 hours per week in the remaining portion of the measurement period. For such an employee it cannot be determined at the start date whether the employee is reasonably expected to average at least 30 hours per week during the initial measurement period and, therefore, the employee would qualify as variable-hour employee. A definition of seasonal employee is not provided under Code § 4980H for this particular purpose, and Notice 2012-58 allows employers to use a “good faith” interpretation of the term through at least 2014.

For these newly-hired seasonal and variable-hour employees, the safe harbor allows an employer to establish an initial measurement period (Initial Measurement Period) of between 3 and 12 consecutive months as the look-back period for determining whether the employee worked an average of 30 hours per week. As with the safe harbor for ongoing employees, the Administrative Period may not exceed 90 days. Together, the Initial Measurement Period and the Administrative Period may not extend beyond the last day of the calendar month that begins on or after the 1-year anniversary of the employee’s start date (i.e., totaling, at most, 13 months and a fraction of a month). The Stability Period must be the same length as for ongoing employees, with slight modifications. For employees determined to be full time, the Stability Period must be no less than 6 consecutive calendar months and at least as long as the Initial Measurement Period. For employees determined not to be full time, the Stability Period must not be more than the Initial Measurement Period plus one month – and must not exceed the remainder of the ongoing employees’ Standard Measurement Period (and associated Administrative Period) in which the Initial Measurement Period ends.

<b>“Full-Time Employee” Determination Safe Harbor Design for Newly Hired Variable-Hour and Seasonal Employees</b>	
Period	Limitations
<b>Initial Measurement Period</b>	At least 3 but not more than 12 consecutive calendar months
<b>Administrative Period</b>	Up to 90 days after the close of the Initial Measurement Period Together with the Initial Measurement Period cannot extend beyond the close of the calendar month that begins on or after the 1-year anniversary of the employee’s start day.
<b>Stability Period</b>	Must be the same length as for ongoing employees  For employees <u>determined to be full-time</u> , at least 6 consecutive calendar months and no shorter than the Initial Measurement Period  For employees <u>determined not to be full-time</u> , no longer than the Initial Measurement Period plus 1 month, and may not exceed the remainder of the Standard Measurement Period (and associated Administrative Period) in which the Initial Measurement Period ends

The limitation on the Stability Period facilitates the transition from the new employee safe harbor to the ongoing employee safe harbor. Once a new employee has been employed for an Initial Measurement Period and also has been employed for an entire Standard Measurement Period, the employee must be tested for full-time status beginning with that Standard Measurement Period under the same conditions as other ongoing employees. The Notice provides an example of an employer with a Standard Measurement Period of the calendar year, and a 12-month Initial Measurement Period that begins with the employee's start date. A new variable-hour employee whose start date is February 12 would be tested for full-time status based on the Initial Measurement Period that runs from the February 12 start date through February 11 of the following year – and again based on the Standard Measurement Period that begins on January 1 following the employee's start date.

### Reliance

A driving purpose of the safe harbors is to avoid the need for employers to make a monthly determination of the employees who are full-time, since Code § 4980H applies its penalties on a monthly basis – based on the number of full-time employees who are employed, or who are certified to receive a premium tax credit or cost sharing reduction, for the particular month. Notice 2012-58 states that the above-described safe harbors can be relied upon through at least the end of 2014 (i.e., employers will not have to comply with subsequent guidance that is more restrictive until at least January 1, 2015). The Notice clarifies, specifically, that this reliance covers measurement periods that begin in 2013 or 2014, and the associated stability periods (which may extend into 2014, 2015 or 2016).

The Notice also provides reliance through 2014 for the safe harbor that is based on W-2 wages for the determination of whether minimum essential coverage is affordable, which was described in Notice 2011-73 and 2012-17.

Comments are requested by September 30 on these full-time employee safe harbors, in particular on the definition of seasonal worker, how to apply the safe harbors following a corporate merger or acquisition, whether additional guidance is needed to determine if an employee is reasonably expected to work an average of 30 hours per week, and what safe harbor methods may be needed to determine the full-time status of short-term assignment employees, temporary staffing employees, and similar employees.

## 2. Maximum 90-Day Waiting Period for Group Health Coverage Is Clarified

New IRS guidance on complying with the maximum 90-day waiting period for group health plan coverage dovetails with the “full-time employee” safe harbor. As with the safe harbor, it can be relied upon through the end of 2014.

Effective for plan years beginning in 2014, group health plans (and issuers of group health coverage) are prohibited from imposing a waiting period of more than 90 days. This limitation is found in Public Health Service Act § 2708, and applies to group health plans (and issuers of group health coverage) by virtue of ERISA §715(a)(1) and Code § 9815(a)(1), which incorporate certain sections of the PHS Act. Both grandfathered and non-grandfathered plans are subject to the 90-day limit.

What is a “waiting period?” IRS Notice 2012-59 explains that a waiting period is the period of time that must pass before coverage for an employee or dependent *who is otherwise eligible to enroll under the terms of the plan* can become effective. “Otherwise eligible” means the individual has met the plan's

substantive conditions for eligibility, such as being in an eligible job classification. This does not mean an employer is required to offer coverage to any particular employee or class of employees – only that, once an individual becomes eligible for coverage under the terms of the plan, he or she cannot be forced to wait more than 90 days for that coverage to become effective.

As a result, eligibility conditions based *solely on the lapse of time* are permissible for no more than 90 days. Other eligibility conditions are generally permissible under PHS Act § 2708 unless they are designed to avoid compliance with the 90-day limit, the Notice explains. An eligibility condition by which employees must complete a minimum number of hours of service is permitted as long as no more than 1,200 cumulative hours of service is required. Further, a plan that allows an individual to take additional time to elect coverage (so that the coverage becomes effective outside the 90-day limit), will satisfy the requirement as long as the individual could have elected coverage to begin within the 90-day period.

Plans that condition eligibility on working full time or working a specified number of hours per pay period may face challenges in applying the 90-day limit to employees who work variable hours. In that case, employers are permitted to utilize the safe harbor methodology in Notice 2012-58 for determining whether a newly-hired variable-hour employee is expected to work the requisite number of hours. A “look back” measurement period of up to 12 months can be used to determine whether an employee meets the plan’s eligibility condition. The time period for determining whether an employee meets the hours condition will pass muster as long as coverage becomes effective, for an employee who is determined to meet the hours requirement, no later than 13 months after the employee’s start date (plus, if the employee’s start date is not the first day of the month, the time remaining until the first day of the next calendar month).

Various examples are provided in the Notice, including one in which a plan covers only full-time employees, defined as employees who regularly work 30 hours per week. A variable-hour employee is hired on November 26 to work between 20 and 45 hours per week depending upon shift availability and the employee’s availability. Because it cannot be determined whether the employee is reasonably expected to work full time, a measurement period of 12 months is applied from the employee’s start date. If, looking back over the measurement period, the employee is determined to be a full-time employee, coverage is made effective no later than the first day of the first calendar month after the enrollment forms are received. Under the facts in the example, the employee’s measurement period would end on November 25 of calendar year following the start date. A determination would be made of the employee’s full-time status, and the employee would be notified if eligible. If the employee elects coverage, the first day of coverage would be January 1 of the second calendar year following the start date. Since coverage can become effective within 13 months from the employee’s start date, plus the time remaining until the first day of the next calendar month, the measurement period for making the determination of full-time status satisfies the 90-day limitation on waiting periods.

The guidance on the 90-day limit will remain in effect at least through the end of 2014. The Notice states that subsequent guidance, if it imposes additional or modified requirements, will provide adequate time to comply.

### 3. IRS Discontinues “Missing Participant” Letter Forwarding Program

The IRS will no longer provide letter-forwarding services to locate taxpayers that may be owed assets – including letters to missing participants who may be owed a plan benefit from plan administrators, plan sponsors, or qualified termination administrators (QTA) under the Department of Labor’s Abandoned Plan Program.

Citing the expanded availability of missing person locator services, as well as the internet, the IRS announced in Revenue Procedure 2012-35 that it is ceasing its letter-forwarding services for all but “humane purposes” – which it defines as ones “in which a person is seeking to find a missing person to convey a message of an urgent or compelling nature, or is seeking to find a missing person because of an emergency situation.” Examples include letters to notify a person of a serious illness or death of a close relative. Letters that merely provide a financial benefit will not be processed. Explicitly excluded from the program are letters from individuals or organizations that control assets that may be due to the taxpayer, “including Plan Administrators, sponsors of qualified retirement plans, or QTAs of abandoned plans under the Department of Labor’s Abandoned Plan Program who are attempting to locate missing plan participants.” The change is effective for requests postmarked on or after August 31, 2012.

The PBGC continues to maintain a missing participant program for fully-funded defined benefit plans that are terminating. To qualify, the plan administrator must first make a diligent effort, including the use of a locator service, to find the missing participant. Fiduciaries of terminating defined contribution plans, likewise, have obligations under ERISA to attempt to locate missing plan participants, as discussed in Field Assistance Bulletin 2004-2.

*If you have any questions or need additional information about articles appearing in this or previous versions of Washington Bulletin, please contact:*

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Hardat 1

## HB 1059 – Information Requests

	Request	Response
1	What is the projected HDHP rate for Political Subdivisions?	The following is the estimated rates (all rates are finalized after the legislative session): HDHP NGF option for Political Subs Single = \$452.64 Family = 1,093.54
2	What is the state contribution to the HSA this biennium?	Present HSA annual contribution for state actives: Single = \$658.08 Family = \$1,592.88
3	What is the projected state contribution to the HSA for next biennium	HSA annual contribution for State Actives Single = \$699.12 Family = 1,691.04
4	Copy of Federal Statutes referenced in the proposed legislation	See <b>Attachment #1 (pages 1-16)</b>
5	Does the change in definition of temporary affect any other programs beyond the health (i.e. retirement, dental, vision, etc)?	Yes, it covers the other programs in NDCC 54-52.1 (life, vision, dental, LTC & EAP) As presently proposed this would mean the minimum payment provision would apply to the other programs as well. This is not intended and therefore we are suggesting the amendment in <b>Attachment #2 (page 17)</b> is an amendment to insure that the minimum payment provision only applies to the health plan.
6	Should employer be more clearly defined in statute for purposes of the ACA	See <b>Attachment #3 (page 18)</b>

#1  
1059

**Other issues:** The PERS board received information at its last board meeting relating to a provision in the proposed rules relating small employers in the nongrandfathered health plan in PERS that may require them to transition to other coverage (**Attachment #4, pages 19-20**). PERS has a provision that if a political subdivision withdraws from the plan prior to the end of 60 months and if their expenses exceeded the premium, they must pay to the plan the difference before departing. This provision is to reduce adverse selection to plan. However, if political subdivisions are required to leave due to a federal law it would not be an adverse selection issue and therefore consideration should be given to waiving this provision. **Attachment #5 (page 21) is an amendment to waive this provision is the reason for leaving the plan is due to federal law.**

“(3) DEFINITIONS AND SPECIAL RULES.—

“(A) POSSESSION OF THE UNITED STATES.—For purposes of this subsection, the term ‘possession of the United States’ includes the Commonwealth of Puerto Rico and the Commonwealth of the Northern Mariana Islands.

“(B) MIRROR CODE TAX SYSTEM.—For purposes of this subsection, the term ‘mirror code tax system’ means, with respect to any possession of the United States, the income tax system of such possession if the income tax liability of the residents of such possession under such system is determined by reference to the income tax laws of the United States as if such possession were the United States.

“(C) TREATMENT OF PAYMENTS.—For purposes of section 1324(b)(2) of title 31, United States Code, the payments under this subsection shall be treated in the same manner as a refund due from the credit allowed under section 36A of the Internal Revenue Code of 1986 (as added by this section).”

REFUNDS DISREGARDED IN THE ADMINISTRATION OF FEDERAL PROGRAMS AND FEDERALLY ASSISTED PROGRAMS

Pub. L. 111-5, div. B, title I, §1001(c), Feb. 17, 2009, 123 Stat. 311, provided that: “Any credit or refund allowed or made to any individual by reason of section 36A of the Internal Revenue Code of 1986 (as added by this section) or by reason of subsection (b) of this section [set out as a note above] shall not be taken into account as income and shall not be taken into account as resources for the month of receipt and the following 2 months, for purposes of determining the eligibility of such individual or any other individual for benefits or assistance, or the amount or extent of benefits or assistance, under any Federal program or under any State or local program financed in whole or in part with Federal funds.”

**§36B. Refundable credit for coverage under a qualified health plan**

**(a) In general**

In the case of an applicable taxpayer, there shall be allowed as a credit against the tax imposed by this subtitle for any taxable year an amount equal to the premium assistance credit amount of the taxpayer for the taxable year.

**(b) Premium assistance credit amount**

For purposes of this section—

**(1) In general**

The term “premium assistance credit amount” means, with respect to any taxable year, the sum of the premium assistance amounts determined under paragraph (2) with respect to all coverage months of the taxpayer occurring during the taxable year.

**(2) Premium assistance amount**

The premium assistance amount determined under this subsection with respect to any coverage month is the amount equal to the lesser of—

(A) the monthly premiums for such month for 1 or more qualified health plans offered in the individual market within a State which cover the taxpayer, the taxpayer's spouse, or any dependent (as defined in section 152) of the taxpayer and which were enrolled in through an Exchange established by the State under 1311<sup>1</sup> of the Patient Protection and Affordable Care Act, or

(B) the excess (if any) of—

(i) the adjusted monthly premium for such month for the applicable second lowest cost silver plan with respect to the taxpayer, over

(ii) an amount equal to 1/12 of the product of the applicable percentage and the taxpayer's household income for the taxable year.

**(3) Other terms and rules relating to premium assistance amounts**

For purposes of paragraph (2)—

**(A) Applicable percentage**

**(i) In general**

Except as provided in clause (ii), the applicable percentage for any taxable year shall be the percentage such that the applicable percentage for any taxpayer whose household income is within an income tier specified in the following table shall increase, on a sliding scale in a linear manner, from the initial premium percentage to the final premium percentage specified in such table for such income tier:

In the case of household income (expressed as a percent of poverty line) within the following income tier:	The initial premium percentage is—	The final premium percentage is—
Up to 133%	2.0%	2.0%
133% up to 150%	3.0%	4.0%
150% up to 200%	4.0%	6.3%
200% up to 250%	6.3%	8.05%
250% up to 300%	8.05%	9.5%
300% up to 400%	9.5%	9.5%

**(ii) Indexing**

**(I) In general**

Subject to subclause (II), in the case of taxable years beginning in any calendar year after 2014, the initial and final applicable percentages under clause (i) (as in effect for the preceding calendar year after application of this clause) shall be adjusted to reflect the excess of the rate of premium growth for the preceding calendar year over the rate of income growth for the preceding calendar year.

**(II) Additional adjustment**

Except as provided in subclause (III), in the case of any calendar year after 2018, the percentages described in subclause (I) shall, in addition to the adjustment under subclause (I), be adjusted to reflect the excess (if any) of the rate of premium growth estimated under subclause (I) for the preceding calendar year over the rate of growth in the consumer price index for the preceding calendar year.

**(III) Failsafe**

Subclause (II) shall apply for any calendar year only if the aggregate amount of premium tax credits under this section and cost-sharing reductions under section 1402 of the Patient Protection and Affordable Care Act for the preced-

<sup>1</sup> So in original. Probably should be preceded by “section”.

ing calendar year exceeds an amount equal to 0.504 percent of the gross domestic product for the preceding calendar year.

**(B) Applicable second lowest cost silver plan**

The applicable second lowest cost silver plan with respect to any applicable taxpayer is the second lowest cost silver plan of the individual market in the rating area in which the taxpayer resides which—

(i) is offered through the same Exchange through which the qualified health plans taken into account under paragraph (2)(A) were offered, and

(ii) provides—

(I) self-only coverage in the case of an applicable taxpayer—

(aa) whose tax for the taxable year is determined under section 1(c) (relating to unmarried individuals other than surviving spouses and heads of households) and who is not allowed a deduction under section 151 for the taxable year with respect to a dependent, or

(bb) who is not described in item (aa) but who purchases only self-only coverage, and

(II) family coverage in the case of any other applicable taxpayer.

If a taxpayer files a joint return and no credit is allowed under this section with respect to 1 of the spouses by reason of subsection (e), the taxpayer shall be treated as described in clause (ii)(I) unless a deduction is allowed under section 151 for the taxable year with respect to a dependent other than either spouse and subsection (e) does not apply to the dependent.

**(C) Adjusted monthly premium**

The adjusted monthly premium for an applicable second lowest cost silver plan is the monthly premium which would have been charged (for the rating area with respect to which the premiums under paragraph (2)(A) were determined) for the plan if each individual covered under a qualified health plan taken into account under paragraph (2)(A) were covered by such silver plan and the premium was adjusted only for the age of each such individual in the manner allowed under section 2701 of the Public Health Service Act. In the case of a State participating in the wellness discount demonstration project under section 2705(d) of the Public Health Service Act, the adjusted monthly premium shall be determined without regard to any premium discount or rebate under such project.

**(D) Additional benefits**

If—

(i) a qualified health plan under section 1302(b)(5) of the Patient Protection and Affordable Care Act offers benefits in addition to the essential health benefits required to be provided by the plan, or

(ii) a State requires a qualified health plan under section 1311(d)(3)(B) of such Act to cover benefits in addition to the essen-

tial health benefits required to be provided by the plan,

the portion of the premium for the plan properly allocable (under rules prescribed by the Secretary of Health and Human Services) to such additional benefits shall not be taken into account in determining either the monthly premium or the adjusted monthly premium under paragraph (2).

**(E) Special rule for pediatric dental coverage**

For purposes of determining the amount of any monthly premium, if an individual enrolls in both a qualified health plan and a plan described in section 1311(d)(2)(B)(i)(I)<sup>2</sup> of the Patient Protection and Affordable Care Act for any plan year, the portion of the premium for the plan described in such section that (under regulations prescribed by the Secretary) is properly allocable to pediatric dental benefits which are included in the essential health benefits required to be provided by a qualified health plan under section 1302(b)(1)(J) of such Act shall be treated as a premium payable for a qualified health plan.

**(c) Definition and rules relating to applicable taxpayers, coverage months, and qualified health plan**

For purposes of this section—

**(1) Applicable taxpayer**

**(A) In general**

The term "applicable taxpayer" means, with respect to any taxable year, a taxpayer whose household income for the taxable year equals or exceeds 100 percent but does not exceed 400 percent of an amount equal to the poverty line for a family of the size involved.

**(B) Special rule for certain individuals lawfully present in the United States**

If—

(i) a taxpayer has a household income which is not greater than 100 percent of an amount equal to the poverty line for a family of the size involved, and

(ii) the taxpayer is an alien lawfully present in the United States, but is not eligible for the medicaid program under title XIX of the Social Security Act by reason of such alien status,

the taxpayer shall, for purposes of the credit under this section, be treated as an applicable taxpayer with a household income which is equal to 100 percent of the poverty line for a family of the size involved.

**(C) Married couples must file joint return**

If the taxpayer is married (within the meaning of section 7703) at the close of the taxable year, the taxpayer shall be treated as an applicable taxpayer only if the taxpayer and the taxpayer's spouse file a joint return for the taxable year.

**(D) Denial of credit to dependents**

No credit shall be allowed under this section to any individual with respect to whom

<sup>2</sup> See References in Text note below.

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a deduction under section 151 is allowable to another taxpayer for a taxable year beginning in the calendar year in which such individual's taxable year begins.

**(2) Coverage month**

For purposes of this subsection—

**(A) In general**

The term "coverage month" means, with respect to an applicable taxpayer, any month if—

(i) as of the first day of such month the taxpayer, the taxpayer's spouse, or any dependent of the taxpayer is covered by a qualified health plan described in subsection (b)(2)(A) that was enrolled in through an Exchange established by the State under section 1311 of the Patient Protection and Affordable Care Act, and

(ii) the premium for coverage under such plan for such month is paid by the taxpayer (or through advance payment of the credit under subsection (a) under section 1412 of the Patient Protection and Affordable Care Act).

**(B) Exception for minimum essential coverage**

**(i) In general**

The term "coverage month" shall not include any month with respect to an individual if for such month the individual is eligible for minimum essential coverage other than eligibility for coverage described in section 5000A(f)(1)(C) (relating to coverage in the individual market).

**(ii) Minimum essential coverage**

The term "minimum essential coverage" has the meaning given such term by section 5000A(f).

**(C) Special rule for employer-sponsored minimum essential coverage**

For purposes of subparagraph (B)—

**(i) Coverage must be affordable**

Except as provided in clause (iii), an employee shall not be treated as eligible for minimum essential coverage if such coverage—

(I) consists of an eligible employer-sponsored plan (as defined in section 5000A(f)(2)), and

(II) the employee's required contribution (within the meaning of section 5000A(e)(1)(B)) with respect to the plan exceeds 9.5 percent of the applicable taxpayer's household income.

This clause shall also apply to an individual who is eligible to enroll in the plan by reason of a relationship the individual bears to the employee.

**(ii) Coverage must provide minimum value**

Except as provided in clause (iii), an employee shall not be treated as eligible for minimum essential coverage if such coverage consists of an eligible employer-sponsored plan (as defined in section 5000A(f)(2)) and the plan's share of the total allowed costs of benefits provided

under the plan is less than 60 percent of such costs.

**(iii) Employee or family must not be covered under employer plan**

Clauses (i) and (ii) shall not apply if the employee (or any individual described in the last sentence of clause (i)) is covered under the eligible employer-sponsored plan or the grandfathered health plan.

**(iv) Indexing**

In the case of plan years beginning in any calendar year after 2014, the Secretary shall adjust the 9.5 percent under clause (i)(II) in the same manner as the percentages are adjusted under subsection (b)(3)(A)(ii).

**(3) Definitions and other rules**

**(A) Qualified health plan**

The term "qualified health plan" has the meaning given such term by section 1301(a) of the Patient Protection and Affordable Care Act, except that such term shall not include a qualified health plan which is a catastrophic plan described in section 1302(e) of such Act.

**(B) Grandfathered health plan**

The term "grandfathered health plan" has the meaning given such term by section 1251 of the Patient Protection and Affordable Care Act.

**(d) Terms relating to income and families**

For purposes of this section—

**(1) Family size**

The family size involved with respect to any taxpayer shall be equal to the number of individuals for whom the taxpayer is allowed a deduction under section 151 (relating to allowance of deduction for personal exemptions) for the taxable year.

**(2) Household income**

**(A) Household income**

The term "household income" means, with respect to any taxpayer, an amount equal to the sum of—

(i) the modified adjusted gross income of the taxpayer, plus

(ii) the aggregate modified adjusted gross incomes of all other individuals who—

(I) were taken into account in determining the taxpayer's family size under paragraph (1), and

(II) were required to file a return of tax imposed by section 1 for the taxable year.

**(B) Modified adjusted gross income**

The term "modified adjusted gross income" means adjusted gross income increased by—

(i) any amount excluded from gross income under section 911,

(ii) any amount of interest received or accrued by the taxpayer during the taxable year which is exempt from tax, and

(iii) an amount equal to the portion of the taxpayer's social security benefits (as

defined in section 86(d)) which is not included in gross income under section 86 for the taxable year.

**(3) Poverty line**

**(A) In general**

The term "poverty line" has the meaning given that term in section 2110(c)(5) of the Social Security Act (42 U.S.C. 1397jj(c)(5)).

**(B) Poverty line used**

In the case of any qualified health plan offered through an Exchange for coverage during a taxable year beginning in a calendar year, the poverty line used shall be the most recently published poverty line as of the 1st day of the regular enrollment period for coverage during such calendar year.

**(e) Rules for individuals not lawfully present**

**(1) In general**

If 1 or more individuals for whom a taxpayer is allowed a deduction under section 151 (relating to allowance of deduction for personal exemptions) for the taxable year (including the taxpayer or his spouse) are individuals who are not lawfully present—

(A) the aggregate amount of premiums otherwise taken into account under clauses (i) and (ii) of subsection (b)(2)(A) shall be reduced by the portion (if any) of such premiums which is attributable to such individuals, and

(B) for purposes of applying this section, the determination as to what percentage a taxpayer's household income bears to the poverty level for a family of the size involved shall be made under one of the following methods:

(i) A method under which—

(I) the taxpayer's family size is determined by not taking such individuals into account, and

(II) the taxpayer's household income is equal to the product of the taxpayer's household income (determined without regard to this subsection) and a fraction—

(aa) the numerator of which is the poverty line for the taxpayer's family size determined after application of subclause (I), and

(bb) the denominator of which is the poverty line for the taxpayer's family size determined without regard to subclause (I).

(ii) A comparable method reaching the same result as the method under clause (i).

**(2) Lawfully present**

For purposes of this section, an individual shall be treated as lawfully present only if the individual is, and is reasonably expected to be for the entire period of enrollment for which the credit under this section is being claimed, a citizen or national of the United States or an alien lawfully present in the United States.

**(3) Secretarial authority**

The Secretary of Health and Human Services, in consultation with the Secretary, shall prescribe rules setting forth the methods by which calculations of family size and household income are made for purposes of this subsection. Such rules shall be designed to ensure that the least burden is placed on individuals enrolling in qualified health plans through an Exchange and taxpayers eligible for the credit allowable under this section.

**(f) Reconciliation of credit and advance credit**

**(1) In general**

The amount of the credit allowed under this section for any taxable year shall be reduced (but not below zero) by the amount of any advance payment of such credit under section 1412 of the Patient Protection and Affordable Care Act.

**(2) Excess advance payments**

**(A) In general**

If the advance payments to a taxpayer under section 1412 of the Patient Protection and Affordable Care Act for a taxable year exceed the credit allowed by this section (determined without regard to paragraph (1)), the tax imposed by this chapter for the taxable year shall be increased by the amount of such excess.

**(B) Limitation on increase**

**(i) In general**

In the case of a taxpayer whose household income is less than 400 percent of the poverty line for the size of the family involved for the taxable year, the amount of the increase under subparagraph (A) shall in no event exceed the applicable dollar amount determined in accordance with the following table (one-half of such amount in the case of a taxpayer whose tax is determined under section 1(c) for the taxable year):

If the household income (expressed as a percent of poverty line) is:	The applicable dollar amount is:
Less than 200% .....	\$600
At least 200% but less than 300% .....	\$1,500
At least 300% but less than 400% .....	\$2,500.

**(ii) Indexing of amount**

In the case of any calendar year beginning after 2014, each of the dollar amounts in the table contained under clause (i) shall be increased by an amount equal to—

(I) such dollar amount, multiplied by  
 (II) the cost-of-living adjustment determined under section 1(f)(3) for the calendar year, determined by substituting "calendar year 2013" for "calendar year 1992" in subparagraph (B) thereof.

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If the amount of any increase under clause (i) is not a multiple of \$50, such increase shall be rounded to the next lowest multiple of \$50.

### (3) Information requirement

Each Exchange (or any person carrying out 1 or more responsibilities of an Exchange under section 1311(f)(3) or 1321(c) of the Patient Protection and Affordable Care Act) shall provide the following information to the Secretary and to the taxpayer with respect to any health plan provided through the Exchange:

(A) The level of coverage described in section 1302(d) of the Patient Protection and Affordable Care Act and the period such coverage was in effect.

(B) The total premium for the coverage without regard to the credit under this section or cost-sharing reductions under section 1402 of such Act.

(C) The aggregate amount of any advance payment of such credit or reductions under section 1412 of such Act.

(D) The name, address, and TIN of the primary insured and the name and TIN of each other individual obtaining coverage under the policy.

(E) Any information provided to the Exchange, including any change of circumstances, necessary to determine eligibility for, and the amount of, such credit.

(F) Information necessary to determine whether a taxpayer has received excess advance payments.

### (g) Regulations

The Secretary shall prescribe such regulations as may be necessary to carry out the provisions of this section, including regulations which provide for—

(1) the coordination of the credit allowed under this section with the program for advance payment of the credit under section 1412 of the Patient Protection and Affordable Care Act, and

(2) the application of subsection (f) where the filing status of the taxpayer for a taxable year is different from such status used for determining the advance payment of the credit.

(Added and amended Pub. L. 111-148, title I, §1401(a), title X, §§10105(a)–(c), 10108(h)(1), Mar. 23, 2010, 124 Stat. 213, 906, 914; Pub. L. 111-152, title I, §§1001(a), 1004(a)(1)(A), (2)(A), (c), Mar. 30, 2010, 124 Stat. 1030, 1034, 1035; Pub. L. 111-309, title II, §208(a), (b), Dec. 15, 2010, 124 Stat. 3291, 3292; Pub. L. 112-9, §4(a), Apr. 14, 2011, 125 Stat. 36; Pub. L. 112-10, div. B, title VIII, §1858(b)(1), Apr. 15, 2011, 125 Stat. 168; Pub. L. 112-56, title IV, §401(a), Nov. 21, 2011, 125 Stat. 734.)

#### REFERENCES IN TEXT

Sections 1251, 1301, 1302, 1311, 1321, 1402, and 1412 of the Patient Protection and Affordable Care Act, referred to in text, are classified to sections 18011, 18021, 18022, 18031, 18041, 18071, and 18082, respectively, of Title 42, The Public Health and Welfare.

Sections 2701 and 2705(d) of the Public Health Service Act, referred to in subsec. (b)(3)(C), are classified to sections 300gg and 300gg-4(d), respectively, of Title 42, The Public Health and Welfare. The reference to section 2705(d) probably should be a reference to section

2705(l), which relates to wellness program demonstration project and is classified to section 300gg-4(l) of Title 42.

Section 1311(d)(2)(B)(ii)(I) of the Patient Protection and Affordable Care Act, referred to in subsec. (b)(3)(E), probably means section 1311(d)(2)(B)(ii) of Pub. L. 111-148, which is classified to section 18031(d)(2)(B)(ii) of Title 42, The Public Health and Welfare, and which does not contain subclauses.

The Social Security Act, referred to in subsec. (c)(1)(B)(ii), is act Aug. 14, 1935, ch. 531, 49 Stat. 620. Title XIX of the Act is classified generally to subchapter XIX (§1396 et seq.) of chapter 7 of Title 42, The Public Health and Welfare. For complete classification of this Act to the Code, see section 1305 of Title 42 and Tables.

#### AMENDMENTS

2011—Subsec. (c)(2)(D). Pub. L. 112-10 struck out subpar. (D). Prior to amendment, text read as follows: "The term 'coverage month' shall not include any month in which such individual has a free choice voucher provided under section 10108 of the Patient Protection and Affordable Care Act."

Subsec. (d)(2)(B)(iii). Pub. L. 112-56 added cl. (iii).

Subsec. (f)(2)(B)(i). Pub. L. 112-9 amended cl. (i) generally. Prior to amendment, cl. (i) consisted of text and a table limiting increase in amount recovered on reconciliation of health insurance tax credit and advance of that credit for households with income below 500 percent of federal poverty line.

2010—Subsec. (b)(3)(A)(i). Pub. L. 111-152, §1001(a)(1)(A), substituted "for any taxable year shall be the percentage such that the applicable percentage for any taxpayer whose household income is within an income tier specified in the following table shall increase, on a sliding scale in a linear manner, from the initial premium percentage to the final premium percentage specified in such table for such income tier:" for "with respect to any taxpayer for any taxable year is equal to 2.8 percent, increased by the number of percentage points (not greater than 7) which bears the same ratio to 7 percentage points as—" in introductory provisions, inserted table, and struck out subcls. (I) and (II) which read as follows:

"(I) the taxpayer's household income for the taxable year in excess of 100 percent of the poverty line for a family of the size involved, bears to

"(II) an amount equal to 200 percent of the poverty line for a family of the size involved."

Subsec. (b)(3)(A)(ii). Pub. L. 111-152, §1001(a)(1)(B), added cl. (ii) and struck out former cl. (ii). Text read as follows: "If a taxpayer's household income for the taxable year equals or exceeds 100 percent, but not more than 133 percent, of the poverty line for a family of the size involved, the taxpayer's applicable percentage shall be 2 percent."

Pub. L. 111-148, §10105(a), substituted "equals or exceeds" for "is in excess of".

Subsec. (b)(3)(A)(iii). Pub. L. 111-152, §1001(a)(1)(B), struck out cl. (iii). Text read as follows: "In the case of taxable years beginning in any calendar year after 2014, the Secretary shall adjust the initial and final applicable percentages under clause (i), and the 2 percent under clause (ii), for the calendar year to reflect the excess of the rate of premium growth between the preceding calendar year and 2013 over the rate of income growth for such period."

Subsec. (c)(1)(A). Pub. L. 111-148, §10105(b), inserted "equals or" before "exceeds".

Subsec. (c)(2)(C)(i)(II). Pub. L. 111-152, §1001(a)(2)(A), substituted "9.5 percent" for "9.8 percent".

Subsec. (c)(2)(C)(iv). Pub. L. 111-152, §1001(a)(2), substituted "9.5 percent" for "9.8 percent" and "(b)(3)(A)(ii)" for "(b)(3)(A)(iii)".

Pub. L. 111-148, §10105(c), substituted "subsection (b)(3)(A)(iii)" for "subsection (b)(3)(A)(ii)".

Subsec. (c)(2)(D). Pub. L. 111-148, §10108(h)(1), added subpar. (D).

Subsec. (d)(2)(A)(i), (ii). Pub. L. 111-152, §1004(a)(1)(A), substituted "modified adjusted gross" for "modified gross".

Subsec. (d)(2)(B). Pub. L. 111-152, § 1004(a)(2)(A), amended subpar. (B) generally. Prior to amendment, text read as follows: "The term 'modified gross income' means gross income—

"(i) decreased by the amount of any deduction allowable under paragraph (1), (3), (4), or (10) of section 62(a),

"(ii) increased by the amount of interest received or accrued during the taxable year which is exempt from tax imposed by this chapter, and

"(iii) determined without regard to sections 911, 931, and 933."

Subsec. (f)(2)(B). Pub. L. 111-309, § 208(a), amended generally subpar. heading and cl. (i). Prior to amendment, text of cl. (i) read as follows: "In the case of an applicable taxpayer whose household income is less than 400 percent of the poverty line for the size of the family involved for the taxable year, the amount of the increase under subparagraph (A) shall in no event exceed \$400 (\$250 in the case of a taxpayer whose tax is determined under section 1(c) for the taxable year)."

Subsec. (f)(2)(B)(ii). Pub. L. 111-309, § 208(b), inserted "in the table contained" after "each of the dollar amounts" in introductory provisions.

Subsec. (f)(3). Pub. L. 111-152, § 1004(c), added par. (3).

**EFFECTIVE DATE OF 2011 AMENDMENT**

Pub. L. 112-56, title IV, § 401(b), Nov. 21, 2011, 125 Stat. 734, provided that: "The amendments made by this section [amending this section] shall take effect on the date of the enactment of this Act [Nov. 21, 2011]."

Pub. L. 112-10, div. B, title VIII, § 1858(d), Apr. 15, 2011, 125 Stat. 169, provided that: "The amendments made by this section [amending this section, sections 162, 4980H, and 6056 of this title, and section 218b of Title 29, Labor, and repealing section 139D of this title and section 18101 of Title 42, The Public Health and Welfare] shall take effect as if included in the provisions of, and the amendments made by, the provisions of the Patient Protection and Affordable Care Act [Pub. L. 111-148] to which they relate."

Pub. L. 112-9, § 4(b), Apr. 14, 2011, 125 Stat. 37, provided that: "The amendment made by this section [amending this section] shall apply to taxable years ending after December 31, 2013."

**EFFECTIVE DATE OF 2010 AMENDMENT**

Pub. L. 111-309, title II, § 208(c), Dec. 15, 2010, 124 Stat. 3292, provided that: "The amendments made by this section [amending this section] shall apply to taxable years beginning after December 31, 2013."

Pub. L. 111-148, title X, § 10108(h)(2), Mar. 23, 2010, 124 Stat. 914, provided that: "The amendment made by this subsection [amending this section] shall apply to taxable years beginning after December 31, 2013."

**EFFECTIVE DATE**

Pub. L. 111-148, title I, § 1401(e), Mar. 23, 2010, 124 Stat. 220, provided that: "The amendments made by this section [enacting this section and amending sections 280C and 6211 of this title and section 1324 of Title 31, Money and Finance] shall apply to taxable years ending after December 31, 2013."

**NO IMPACT ON SOCIAL SECURITY TRUST FUNDS**

Pub. L. 112-56, title IV, § 401(c), Nov. 21, 2011, 125 Stat. 734, provided that:

"(1) ESTIMATE OF SECRETARY.—The Secretary of the Treasury, or the Secretary's delegate, shall annually estimate the impact that the amendments made by subsection (a) [amending this section] have on the income and balances of the trust funds established under section 201 of the Social Security Act (42 U.S.C. 401).

"(2) TRANSFER OF FUNDS.—If, under paragraph (1), the Secretary of the Treasury or the Secretary's delegate estimates that such amendments have a negative impact on the income and balances of such trust funds, the Secretary shall transfer, not less frequently than quarterly, from the general fund an amount sufficient

so as to ensure that the income and balances of such trust funds are not reduced as a result of such amendments."

**[§ 36C. Renumbered § 23]**

**§ 37. Overpayments of tax**

**For credit against the tax imposed by this subtitle for overpayments of tax, see section 6401.**

(Aug. 16, 1954, ch. 736, 68A Stat. 16, § 38; renumbered § 39, Pub. L. 87-834, § 2(a), Oct. 16, 1962, 76 Stat. 962; renumbered § 40, Pub. L. 89-44, title VIII, § 809(c), June 21, 1965, 79 Stat. 167; renumbered § 42, Pub. L. 92-178, title VI, § 601(a), Dec. 10, 1971, 85 Stat. 553; renumbered § 43, Pub. L. 94-12, title II, § 203(a), Mar. 29, 1975, 89 Stat. 29; renumbered § 44, Pub. L. 94-12, title II, § 204(a), Mar. 29, 1975, 89 Stat. 30; renumbered § 45, Pub. L. 94-12, title II, § 208(a), Mar. 29, 1975, 89 Stat. 32; renumbered § 35, Pub. L. 98-369, div. A, title IV, § 471(c), July 18, 1984, 98 Stat. 826; renumbered § 36, Pub. L. 107-210, div. A, title II, § 201(a), Aug. 6, 2002, 116 Stat. 954; renumbered § 37, Pub. L. 110-289, div. C, title I, § 3011(a), July 30, 2008, 122 Stat. 2888.)

**PRIOR PROVISIONS**

A prior section 37 was renumbered section 22 of this title.

**SUBPART D—BUSINESS RELATED CREDITS**

- Sec. General business credit.
- 38.
- 39. Carryback and carryforward of unused credits.
- 40. Alcohol, etc., used as fuel.
- 40A. Biodiesel and renewable diesel used as fuel.
- 41. Credit for increasing research activities.
- 41.<sup>1</sup> Employee stock ownership credit.
- 42. Low-income housing credit.
- 43. Enhanced oil recovery credit.
- 44. Expenditures to provide access to disabled individuals.
- [44A-H. Renumbered, Repealed.]
- 45. Electricity produced from certain renewable resources, etc.
- 45A. Indian employment credit.
- 45B. Credit for portion of employer social security taxes paid with respect to employee cash tips.
- 45C. Clinical testing expenses for certain drugs for rare diseases or conditions.
- 45D. New markets tax credit.
- 45E. Small employer pension plan startup costs.
- 45F. Employer-provided child care credit.
- 45G. Railroad track maintenance credit.
- 45H. Credit for production of low sulfur diesel fuel.
- 45I. Credit for producing oil and gas from marginal wells.
- 45K.<sup>2</sup> Credit for producing fuel from a nonconventional source.
- 45J. Credit for production from advanced nuclear power facilities.
- 45L. New energy efficient home credit.
- 45M. Energy efficient appliance credit.
- 45N. Mine rescue team training credit.
- 45O. Agricultural chemicals security credit.
- 45P. Employer wage credit for employees who are active duty members of the uniformed services.
- 45Q. Credit for carbon dioxide sequestration.

<sup>1</sup> Section 41 repealed by Pub. L. 99-514 without corresponding amendment of subpart analysis.

<sup>2</sup> So in original. Probably should follow item 45J.

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ginning in the calendar year in which such individual's taxable year begins.

**(d) Definitions and special rules**

For purposes of this section—

**(1) Qualified tuition and related expenses**

The term "qualified tuition and related expenses" has the meaning given such term by section 25A(f). Such expenses shall be reduced in the same manner as under section 25A(g)(2).

**(2) Identification requirement**

No deduction shall be allowed under subsection (a) to a taxpayer with respect to the qualified tuition and related expenses of an individual unless the taxpayer includes the name and taxpayer identification number of the individual on the return of tax for the taxable year.

**(3) Limitation on taxable year of deduction**

**(A) In general**

A deduction shall be allowed under subsection (a) for qualified tuition and related expenses for any taxable year only to the extent such expenses are in connection with enrollment at an institution of higher education during the taxable year.

**(B) Certain prepayments allowed**

Subparagraph (A) shall not apply to qualified tuition and related expenses paid during a taxable year if such expenses are in connection with an academic term beginning during such taxable year or during the first 3 months of the next taxable year.

**(4) No deduction for married individuals filing separate returns**

If the taxpayer is a married individual (within the meaning of section 7703), this section shall apply only if the taxpayer and the taxpayer's spouse file a joint return for the taxable year.

**(5) Nonresident aliens**

If the taxpayer is a nonresident alien individual for any portion of the taxable year, this section shall apply only if such individual is treated as a resident alien of the United States for purposes of this chapter by reason of an election under subsection (g) or (h) of section 6013.

**(6) Regulations**

The Secretary may prescribe such regulations as may be necessary or appropriate to carry out this section, including regulations requiring recordkeeping and information reporting.

**(e) Termination**

This section shall not apply to taxable years beginning after December 31, 2011.

(Added Pub. L. 107-16, title IV, § 431(a), June 7, 2001, 115 Stat. 66; amended Pub. L. 108-357, title I, § 102(d)(3), Oct. 22, 2004, 118 Stat. 1429; Pub. L. 109-432, div. A, title I, § 101(a), (b), Dec. 20, 2006, 120 Stat. 2933; Pub. L. 110-343, div. C, title II, § 202(a), Oct. 3, 2008, 122 Stat. 3864; Pub. L. 111-312, title VII, § 724(a), Dec. 17, 2010, 124 Stat. 3316.)

**TERMINATION OF SECTION**

For termination of section by section 901 of Pub. L. 107-16, see *Effective and Termination Dates* note below.

**PRIOR PROVISIONS**

A prior section 222 was renumbered section 224 of this title.

Another prior section 222, added Pub. L. 97-34, title I, § 125(a), Aug. 13, 1981, 95 Stat. 201; amended Pub. L. 97-448, title I, § 101(f), Jan. 12, 1983, 96 Stat. 2367, related to deduction of adoption expenses, prior to repeal by Pub. L. 99-514, title I, §§ 135(a), 151(a), Oct. 22, 1986, 100 Stat. 2116, 2121, applicable to taxable years beginning after Dec. 31, 1986.

**AMENDMENTS**

2010—Subsec. (e). Pub. L. 111-312 substituted "December 31, 2011" for "December 31, 2009".

2008—Subsec. (e). Pub. L. 110-343 substituted "December 31, 2009" for "December 31, 2007".

2008—Subsec. (b)(2)(B). Pub. L. 109-432, § 101(b), substituted "After 2003" for "2004 and 2005" in heading and "any taxable year beginning after 2003" for "a taxable year beginning in 2004 or 2005" in introductory provisions.

Subsec. (e). Pub. L. 109-432, § 101(a), substituted "2007" for "2005".

2004—Subsec. (b)(2)(C)(i). Pub. L. 108-357 inserted "199," before "911".

**EFFECTIVE DATE OF 2010 AMENDMENT**

Pub. L. 111-312, title VII, § 724(b), Dec. 17, 2010, 124 Stat. 3316, provided that: "The amendment made by this section [amending this section] shall apply to taxable years beginning after December 31, 2009."

**EFFECTIVE DATE OF 2008 AMENDMENT**

Pub. L. 110-343, div. C, title II, § 202(b), Oct. 3, 2008, 122 Stat. 3864, provided that: "The amendment made by this section [amending this section] shall apply to taxable years beginning after December 31, 2007."

**EFFECTIVE DATE OF 2006 AMENDMENT**

Pub. L. 109-432, div. A, title I, § 101(c), Dec. 20, 2006, 120 Stat. 2933, provided that: "The amendments made by this section [amending this section] shall apply to taxable years beginning after December 31, 2005."

**EFFECTIVE DATE OF 2004 AMENDMENT**

Amendment by Pub. L. 108-357 applicable to taxable years beginning after Dec. 31, 2004, see section 102(e) of Pub. L. 108-357, set out as a note under section 56 of this title.

**EFFECTIVE AND TERMINATION DATES**

Section applicable to payments made in taxable years beginning after Dec. 31, 2001, see section 431(d) of Pub. L. 107-16, set out as an *Effective and Termination Dates* of 2001 Amendment note under section 62 of this title.

Section inapplicable to taxable, plan, or limitation years beginning after Dec. 31, 2012, and the Internal Revenue Code of 1986 to be applied and administered to such years as if it had never been enacted, see section 901 of Pub. L. 107-16, set out as an *Effective and Termination Dates* of 2001 Amendment note under section 1 of this title.

**§ 223. Health savings accounts**

**(a) Deduction allowed**

In the case of an individual who is an eligible individual for any month during the taxable year, there shall be allowed as a deduction for the taxable year an amount equal to the aggregate amount paid in cash during such taxable

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year by or on behalf of such individual to a health savings account of such individual.

**(b) Limitations**

**(1) In general**

The amount allowable as a deduction under subsection (a) to an individual for the taxable year shall not exceed the sum of the monthly limitations for months during such taxable year that the individual is an eligible individual.

**(2) Monthly limitation**

The monthly limitation for any month is 1/2 of—

(A) in the case of an eligible individual who has self-only coverage under a high deductible health plan as of the first day of such month, \$2,250.

(B) in the case of an eligible individual who has family coverage under a high deductible health plan as of the first day of such month, \$4,500.

**(3) Additional contributions for individuals 55 or older**

**(A) In general**

In the case of an individual who has attained age 55 before the close of the taxable year, the applicable limitation under subparagraphs (A) and (B) of paragraph (2) shall be increased by the additional contribution amount.

**(B) Additional contribution amount**

For purposes of this section, the additional contribution amount is the amount determined in accordance with the following table:

For taxable years beginning in:	The additional contribution amount is:
2004 .....	\$500
2005 .....	\$600
2006 .....	\$700
2007 .....	\$800
2008 .....	\$900
2009 and thereafter .....	\$1,000.

**(4) Coordination with other contributions**

The limitation which would (but for this paragraph) apply under this subsection to an individual for any taxable year shall be reduced (but not below zero) by the sum of—

(A) the aggregate amount paid for such taxable year to Archer MSAs of such individual,

(B) the aggregate amount contributed to health savings accounts of such individual which is excludable from the taxpayer's gross income for such taxable year under section 106(d) (and such amount shall not be allowed as a deduction under subsection (a)), and

(C) the aggregate amount contributed to health savings accounts of such individual for such taxable year under section 408(d)(9) (and such amount shall not be allowed as a deduction under subsection (a)).

Subparagraph (A) shall not apply with respect to any individual to whom paragraph (5) applies.

**(5) Special rule for married individuals**

In the case of individuals who are married to each other, if either spouse has family coverage—

(A) both spouses shall be treated as having only such family coverage (and if such spouses each have family coverage under different plans, as having the family coverage with the lowest annual deductible), and

(B) the limitation under paragraph (1) (after the application of subparagraph (A) and without regard to any additional contribution amount under paragraph (3))—

(i) shall be reduced by the aggregate amount paid to Archer MSAs of such spouses for the taxable year, and

(ii) after such reduction, shall be divided equally between them unless they agree on a different division.

**(6) Denial of deduction to dependents**

No deduction shall be allowed under this section to any individual with respect to whom a deduction under section 151 is allowable to another taxpayer for a taxable year beginning in the calendar year in which such individual's taxable year begins.

**(7) Medicare eligible individuals**

The limitation under this subsection for any month with respect to an individual shall be zero for the first month such individual is entitled to benefits under title XVIII of the Social Security Act and for each month thereafter.

**(8) Increase in limit for individuals becoming eligible individuals after the beginning of the year**

**(A) In general**

For purposes of computing the limitation under paragraph (1) for any taxable year, an individual who is an eligible individual during the last month of such taxable year shall be treated—

(i) as having been an eligible individual during each of the months in such taxable year, and

(ii) as having been enrolled, during each of the months such individual is treated as an eligible individual solely by reason of clause (i), in the same high deductible health plan in which the individual was enrolled for the last month of such taxable year.

**(B) Failure to maintain high deductible health plan coverage**

**(i) In general**

If, at any time during the testing period, the individual is not an eligible individual, then—

(I) gross income of the individual for the taxable year in which occurs the first month in the testing period for which such individual is not an eligible individual is increased by the aggregate amount of all contributions to the health savings account of the individual which could not have been made but for subparagraph (A), and

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(II) the tax imposed by this chapter for any taxable year on the individual shall be increased by 10 percent of the amount of such increase.

**(ii) Exception for disability or death**

Subclauses (I) and (II) of clause (i) shall not apply if the individual ceased to be an eligible individual by reason of the death of the individual or the individual becoming disabled (within the meaning of section 72(m)(7)).

**(iii) Testing period**

The term "testing period" means the period beginning with the last month of the taxable year referred to in subparagraph (A) and ending on the last day of the 12th month following such month.

**(c) Definitions and special rules**

For purposes of this section—

**(1) Eligible individual**

**(A) In general**

The term "eligible individual" means, with respect to any month, any individual if—

(i) such individual is covered under a high deductible health plan as of the 1st day of such month, and

(ii) such individual is not, while covered under a high deductible health plan, covered under any health plan—

(I) which is not a high deductible health plan, and

(II) which provides coverage for any benefit which is covered under the high deductible health plan.

**(B) Certain coverage disregarded**

Subparagraph (A)(ii) shall be applied without regard to—

(i) coverage for any benefit provided by permitted insurance,

(ii) coverage (whether through insurance or otherwise) for accidents, disability, dental care, vision care, or long-term care, and

(iii) for taxable years beginning after December 31, 2006, coverage under a health flexible spending arrangement during any period immediately following the end of a plan year of such arrangement during which unused benefits or contributions remaining at the end of such plan year may be paid or reimbursed to plan participants for qualified benefit expenses incurred during such period if—

(I) the balance in such arrangement at the end of such plan year is zero, or

(II) the individual is making a qualified HSA distribution (as defined in section 106(e)) in an amount equal to the remaining balance in such arrangement as of the end of such plan year, in accordance with rules prescribed by the Secretary.

**(2) High deductible health plan**

**(A) In general**

The term "high deductible health plan" means a health plan—

(i) which has an annual deductible which is not less than—

(I) \$1,000 for self-only coverage, and

(II) twice the dollar amount in subclause (I) for family coverage, and

(ii) the sum of the annual deductible and the other annual out-of-pocket expenses required to be paid under the plan (other than for premiums) for covered benefits does not exceed—

(I) \$5,000 for self-only coverage, and

(II) twice the dollar amount in subclause (I) for family coverage.

**(B) Exclusion of certain plans**

Such term does not include a health plan if substantially all of its coverage is coverage described in paragraph (1)(B).

**(C) Safe harbor for absence of preventive care deductible**

A plan shall not fail to be treated as a high deductible health plan by reason of failing to have a deductible for preventive care (within the meaning of section 1871 of the Social Security Act, except as otherwise provided by the Secretary).

**(D) Special rules for network plans**

In the case of a plan using a network of providers—

**(i) Annual out-of-pocket limitation**

Such plan shall not fail to be treated as a high deductible health plan by reason of having an out-of-pocket limitation for services provided outside of such network which exceeds the applicable limitation under subparagraph (A)(ii).

**(ii) Annual deductible**

Such plan's annual deductible for services provided outside of such network shall not be taken into account for purposes of subsection (b)(2).

**(3) Permitted insurance**

The term "permitted insurance" means—

(A) insurance if substantially all of the coverage provided under such insurance relates to—

(i) liabilities incurred under workers' compensation laws,

(ii) tort liabilities,

(iii) liabilities relating to ownership or use of property, or

(iv) such other similar liabilities as the Secretary may specify by regulations,

(B) insurance for a specified disease or illness, and

(C) insurance paying a fixed amount per day (or other period) of hospitalization.

**(4) Family coverage**

The term "family coverage" means any coverage other than self-only coverage.

**(5) Archer MSA**

The term "Archer MSA" has the meaning given such term in section 220(d).

**(d) Health savings account**

For purposes of this section—

**(1) In general**

The term "health savings account" means a trust created or organized in the United States as a health savings account exclusively for the purpose of paying the qualified medical expenses of the account beneficiary, but only if the written governing instrument creating the trust meets the following requirements:

(A) Except in the case of a rollover contribution described in subsection (f)(5) or section 220(f)(5), no contribution will be accepted—

(i) unless it is in cash, or

(ii) to the extent such contribution, when added to previous contributions to the trust for the calendar year, exceeds the sum of—

(I) the dollar amount in effect under subsection (b)(2)(B), and

(II) the dollar amount in effect under subsection (b)(3)(B).

(B) The trustee is a bank (as defined in section 408(n)), an insurance company (as defined in section 816), or another person who demonstrates to the satisfaction of the Secretary that the manner in which such person will administer the trust will be consistent with the requirements of this section.

(C) No part of the trust assets will be invested in life insurance contracts.

(D) The assets of the trust will not be commingled with other property except in a common trust fund or common investment fund.

(E) The interest of an individual in the balance in his account is nonforfeitable.

**(2) Qualified medical expenses****(A) In general**

The term "qualified medical expenses" means, with respect to an account beneficiary, amounts paid by such beneficiary for medical care (as defined in section 213(d)<sup>1</sup> for such individual, the spouse of such individual, and any dependent (as defined in section 152, determined without regard to subsections (b)(1), (b)(2), and (d)(1)(B) thereof) of such individual, but only to the extent such amounts are not compensated for by insurance or otherwise. Such term shall include an amount paid for medicine or a drug only if such medicine or drug is a prescribed drug (determined without regard to whether such drug is available without a prescription) or is insulin.

**(B) Health insurance may not be purchased from account**

Subparagraph (A) shall not apply to any payment for insurance.

**(C) Exceptions**

Subparagraph (B) shall not apply to any expense for coverage under—

(i) a health plan during any period of continuation coverage required under any Federal law,

(ii) a qualified long-term care insurance contract (as defined in section 7702B(b)),

(iii) a health plan during a period in which the individual is receiving unemployment compensation under any Federal or State law, or

(iv) in the case of an account beneficiary who has attained the age specified in section 1811 of the Social Security Act, any health insurance other than a medicare supplemental policy (as defined in section 1882 of the Social Security Act).

**(3) Account beneficiary**

The term "account beneficiary" means the individual on whose behalf the health savings account was established.

**(4) Certain rules to apply**

Rules similar to the following rules shall apply for purposes of this section:

(A) Section 219(d)(2) (relating to no deduction for rollovers).

(B) Section 219(f)(3) (relating to time when contributions deemed made).

(C) Except as provided in section 106(d), section 219(f)(5) (relating to employer payments).

(D) Section 408(g) (relating to community property laws).

(E) Section 408(h) (relating to custodial accounts).

**(e) Tax treatment of accounts****(1) In general**

A health savings account is exempt from taxation under this subtitle unless such account has ceased to be a health savings account. Notwithstanding the preceding sentence, any such account is subject to the taxes imposed by section 511 (relating to imposition of tax on unrelated business income of charitable, etc. organizations).

**(2) Account terminations**

Rules similar to the rules of paragraphs (2) and (4) of section 408(e) shall apply to health savings accounts, and any amount treated as distributed under such rules shall be treated as not used to pay qualified medical expenses.

**(f) Tax treatment of distributions****(1) Amounts used for qualified medical expenses**

Any amount paid or distributed out of a health savings account which is used exclusively to pay qualified medical expenses of any account beneficiary shall not be includible in gross income.

**(2) Inclusion of amounts not used for qualified medical expenses**

Any amount paid or distributed out of a health savings account which is not used exclusively to pay the qualified medical expenses of the account beneficiary shall be included in the gross income of such beneficiary.

**(3) Excess contributions returned before due date of return****(A) In general**

If any excess contribution is contributed for a taxable year to any health savings account of an individual, paragraph (2) shall

<sup>1</sup> So in original. Probably should be followed by a second closing parenthesis.

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not apply to distributions from the health savings accounts of such individual (to the extent such distributions do not exceed the aggregate excess contributions to all such accounts of such individual for such year) if—

(i) such distribution is received by the individual on or before the last day prescribed by law (including extensions of time) for filing such individual's return for such taxable year, and

(ii) such distribution is accompanied by the amount of net income attributable to such excess contribution.

Any net income described in clause (ii) shall be included in the gross income of the individual for the taxable year in which it is received.

**(B) Excess contribution**

For purposes of subparagraph (A), the term "excess contribution" means any contribution (other than a rollover contribution described in paragraph (5) or section 220(f)(5)) which is neither excludable from gross income under section 106(d) nor deductible under this section.

**(4) Additional tax on distributions not used for qualified medical expenses**

**(A) In general**

The tax imposed by this chapter on the account beneficiary for any taxable year in which there is a payment or distribution from a health savings account of such beneficiary which is includible in gross income under paragraph (2) shall be increased by 20 percent of the amount which is so includible.

**(B) Exception for disability or death**

Subparagraph (A) shall not apply if the payment or distribution is made after the account beneficiary becomes disabled within the meaning of section 72(m)(7) or dies.

**(C) Exception for distributions after medicare eligibility**

Subparagraph (A) shall not apply to any payment or distribution after the date on which the account beneficiary attains the age specified in section 1811 of the Social Security Act.

**(5) Rollover contribution**

An amount is described in this paragraph as a rollover contribution if it meets the requirements of subparagraphs (A) and (B).

**(A) In general**

Paragraph (2) shall not apply to any amount paid or distributed from a health savings account to the account beneficiary to the extent the amount received is paid into a health savings account for the benefit of such beneficiary not later than the 60th day after the day on which the beneficiary receives the payment or distribution.

**(B) Limitation**

This paragraph shall not apply to any amount described in subparagraph (A) received by an individual from a health savings account if, at any time during the 1-

year period ending on the day of such receipt, such individual received any other amount described in subparagraph (A) from a health savings account which was not includible in the individual's gross income because of the application of this paragraph.

**(6) Coordination with medical expense deduction**

For purposes of determining the amount of the deduction under section 213, any payment or distribution out of a health savings account for qualified medical expenses shall not be treated as an expense paid for medical care.

**(7) Transfer of account incident to divorce**

The transfer of an individual's interest in a health savings account to an individual's spouse or former spouse under a divorce or separation instrument described in subparagraph (A) of section 71(b)(2) shall not be considered a taxable transfer made by such individual notwithstanding any other provision of this subtitle, and such interest shall, after such transfer, be treated as a health savings account with respect to which such spouse is the account beneficiary.

**(8) Treatment after death of account beneficiary**

**(A) Treatment if designated beneficiary is spouse**

If the account beneficiary's surviving spouse acquires such beneficiary's interest in a health savings account by reason of being the designated beneficiary of such account at the death of the account beneficiary, such health savings account shall be treated as if the spouse were the account beneficiary.

**(B) Other cases**

**(i) In general**

If, by reason of the death of the account beneficiary, any person acquires the account beneficiary's interest in a health savings account in a case to which subparagraph (A) does not apply—

(I) such account shall cease to be a health savings account as of the date of death, and

(II) an amount equal to the fair market value of the assets in such account on such date shall be includible if such person is not the estate of such beneficiary, in such person's gross income for the taxable year which includes such date, or if such person is the estate of such beneficiary, in such beneficiary's gross income for the last taxable year of such beneficiary.

**(ii) Special rules**

**(I) Reduction of inclusion for predeath expenses**

The amount includible in gross income under clause (i) by any person (other than the estate) shall be reduced by the amount of qualified medical expenses which were incurred by the decedent before the date of the decedent's death and paid by such person within 1 year after such date.

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**(II) Deduction for estate taxes**

An appropriate deduction shall be allowed under section 691(c) to any person (other than the decedent or the decedent's spouse) with respect to amounts included in gross income under clause (i) by such person.

**(g) Cost-of-living adjustment****(1) In general**

Each dollar amount in subsections (b)(2) and (c)(2)(A) shall be increased by an amount equal to—

- (A) such dollar amount, multiplied by
- (B) the cost-of-living adjustment determined under section 1(f)(3) for the calendar year in which such taxable year begins determined by substituting for "calendar year 1992" in subparagraph (B) thereof—
  - (i) except as provided in clause (ii), "calendar year 1997", and
  - (ii) in the case of each dollar amount in subsection (c)(2)(A), "calendar year 2003".

In the case of adjustments made for any taxable year beginning after 2007, section 1(f)(4) shall be applied for purposes of this paragraph by substituting "March 31" for "August 31", and the Secretary shall publish the adjusted amounts under subsections (b)(2) and (c)(2)(A) for taxable years beginning in any calendar year no later than June 1 of the preceding calendar year.

**(2) Rounding**

If any increase under paragraph (1) is not a multiple of \$50, such increase shall be rounded to the nearest multiple of \$50.

**(h) Reports**

The Secretary may require—

- (1) the trustee of a health savings account to make such reports regarding such account to the Secretary and to the account beneficiary with respect to contributions, distributions, the return of excess contributions, and such other matters as the Secretary determines appropriate, and
- (2) any person who provides an individual with a high deductible health plan to make such reports to the Secretary and to the account beneficiary with respect to such plan as the Secretary determines appropriate.

The reports required by this subsection shall be filed at such time and in such manner and furnished to such individuals at such time and in such manner as may be required by the Secretary.

(Added Pub. L. 108-173, title XII, §1201(a), Dec. 8, 2003, 117 Stat. 2469; amended Pub. L. 109-135, title IV, §404(c), Dec. 21, 2005, 119 Stat. 2634; Pub. L. 109-432, div. A, title III, §§302(b), 303(a), (b), 304, 305(a), 307(b), Dec. 20, 2006, 120 Stat. 2949, 2950, 2953; Pub. L. 111-148, title IX, §§9003(a), 9004(a), Mar. 23, 2010, 124 Stat. 854.)

**INFLATION ADJUSTED ITEMS FOR CERTAIN YEARS**

*For inflation adjustment of certain items in this section, see Revenue Procedures listed in a table below and under section 1 of this title.*

**REFERENCES IN TEXT**

The Social Security Act, referred to in subsecs. (b)(7), (c)(2)(C), (d)(2)(C)(iv), (f)(4)(C), is act Aug. 14, 1935, ch.

531, 49 Stat. 620, as amended. Title XVIII of the Act is classified generally to subchapter XVIII (§1395 et seq.) of chapter 7 of Title 42, The Public Health and Welfare. Sections 1811, 1871, and 1882 of the Act are classified to sections 1395c, 1395hh, and 1395ss, respectively, of Title 42. For complete classification of this Act to the Code, see section 1305 of Title 42 and Tables.

**PRIOR PROVISIONS**

A prior section 223 was renumbered section 224 of this title.

**AMENDMENTS**

2010—Subsec. (d)(2)(A). Pub. L. 111-148, §9003(a), inserted at end "Such term shall include an amount paid for medicine or a drug only if such medicine or drug is a prescribed drug (determined without regard to whether such drug is available without a prescription) or is insulin."

Subsec. (f)(4)(A). Pub. L. 111-148, §9004(a), substituted "20 percent" for "10 percent".

2006—Subsec. (b)(2)(A). Pub. L. 109-432, §303(a)(1), substituted "\$2,250." for "the lesser of—

- "(i) the annual deductible under such coverage, or
- "(ii) \$2,250, or".

Subsec. (b)(2)(B). Pub. L. 109-432, §303(a)(2), substituted "\$4,500." for "the lesser of—

- "(i) the annual deductible under such coverage, or
- "(ii) \$4,500."

Subsec. (b)(4)(C). Pub. L. 109-432, §307(b), added subpar. (C).

Subsec. (b)(8). Pub. L. 109-432, §305(a), added par. (8).

Subsec. (c)(1)(B)(iii). Pub. L. 109-432, §302(b), added cl. (iii).

Subsec. (d)(1)(A)(ii)(I). Pub. L. 109-432, §303(b), substituted "subsection (b)(2)(B)" for "subsection (b)(2)(B)(ii)".

Subsec. (g)(1). Pub. L. 109-432, §304, inserted concluding provisions.

2005—Subsec. (d)(2)(A). Pub. L. 109-135 inserted "determined without regard to subsections (b)(1), (b)(2), and (d)(1)(B) thereof" after "section 152".

**EFFECTIVE DATE OF 2010 AMENDMENT**

Amendment by section 9003(a) of Pub. L. 111-148 applicable to amounts paid with respect to taxable years beginning after Dec. 31, 2010, see section 9003(d)(1) of Pub. L. 111-148, set out as a note under section 220 of this title.

Amendment by section 9004(a) of Pub. L. 111-148 applicable to distributions made after Dec. 31, 2010, see section 9004(c) of Pub. L. 111-148, set out as a note under section 220 of this title.

**EFFECTIVE DATE OF 2006 AMENDMENT**

Pub. L. 109-432, div. A, title III, §302(c)(2), Dec. 20, 2006, 120 Stat. 2949, provided that: "The amendment made by subsection (b) [amending this section] shall take effect on the date of the enactment of this Act [Dec. 20, 2006]."

Pub. L. 109-432, div. A, title III, §303(c), Dec. 20, 2006, 120 Stat. 2950, provided that: "The amendments made by this section [amending this section] shall apply to taxable years beginning after December 31, 2006."

Pub. L. 109-432, div. A, title III, §305(b), Dec. 20, 2006, 120 Stat. 2951, provided that: "The amendments made by this section [amending this section] shall apply to taxable years beginning after December 31, 2006."

Pub. L. 109-432, div. A, title III, §307(c), Dec. 20, 2006, 120 Stat. 2953, provided that: "The amendments made by this section [amending this section and section 408 of this title] shall apply to taxable years beginning after December 31, 2006."

**EFFECTIVE DATE OF 2005 AMENDMENT**

Amendment by Pub. L. 109-135 effective as if included in the provisions of the Working Families Tax Relief Act of 2004, Pub. L. 108-311, to which such amendment relates, see section 404(d) of Pub. L. 109-135, set out as a note under section 21 of this title.

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## EFFECTIVE DATE

Section applicable to taxable years beginning after Dec. 31, 2003, see section 1201(k) of Pub. L. 108-173, set out as an Effective Date of 2003 Amendment note under section 62 of this title.

## INFLATION ADJUSTED ITEMS FOR CERTAIN YEARS

Provisions relating to inflation adjustment of items in this section for certain years were contained in the following:

- 2012—Revenue Procedure 2011-32.
- 2011—Revenue Procedure 2010-22.
- 2010—Revenue Procedure 2009-29.
- 2009—Revenue Procedure 2008-29.
- 2008—Revenue Procedure 2007-36.

## § 224. Cross reference

For deductions in respect of a decedent, see section 691.

(Aug. 16, 1954, ch. 736, 68A Stat. 72, § 217; renumbered § 218, Pub. L. 88-272, title II, § 213(a)(1), Feb. 26, 1964, 78 Stat. 50; renumbered § 219, Pub. L. 92-178, title VII, § 702(a), Dec. 10, 1971, 85 Stat. 561; renumbered § 220, Pub. L. 93-406, title II, § 2002(a)(1), Sept. 2, 1974, 88 Stat. 958; renumbered § 221, Pub. L. 94-455, title XV, § 1501(a), Oct. 4, 1976, 90 Stat. 1734; renumbered § 222, renumbered § 223, Pub. L. 97-34, title I, §§ 103(a), 125(a), Aug. 13, 1981, 95 Stat. 187, 201; renumbered § 220 and amended Pub. L. 99-514, title I, § 135(b)(1), title III, § 301(b)(5)(A), Oct. 22, 1986, 100 Stat. 2116, 2217; renumbered § 221, Pub. L. 100-647, title VI, § 6007(a), Nov. 10, 1988, 102 Stat. 3687; renumbered § 220, Pub. L. 101-508, title XI, § 11802(e)(2), Nov. 5, 1990, 104 Stat. 1388-530; renumbered § 221, Pub. L. 104-191, title III, § 301(a), Aug. 21, 1996, 110 Stat. 2037; renumbered § 222, Pub. L. 105-34, title II, § 202(a), Aug. 5, 1997, 111 Stat. 806; renumbered § 223, Pub. L. 107-16, title IV, § 431(a), June 7, 2001, 115 Stat. 66; renumbered § 224, Pub. L. 108-173, title XII, § 1201(a), Dec. 8, 2003, 117 Stat. 2469.)

## AMENDMENT OF SECTION

For termination of amendment by section 901 of Pub. L. 107-16, see *Effective and Termination Dates of 2001 Amendment* note below.

## AMENDMENTS

- 2003—Pub. L. 108-173 renumbered section 223 of this title as this section.
- 2001—Pub. L. 107-16, §§ 431(a), 901, temporarily renumbered section 222 as this section. See *Effective and Termination Dates of 2001 Amendment* note below.
- 1997—Pub. L. 105-34 renumbered section 221 of this title as this section.
- 1996—Pub. L. 104-191 renumbered section 220 of this title as this section.
- 1990—Pub. L. 101-508 renumbered section 221 of this title as this section.
- 1986—Pub. L. 99-514, § 135(b)(1), renumbered section 223 of this title as this section.
- Pub. L. 99-514, § 301(b)(5)(A), amended section generally, substituting "reference" for "references" in section catchline, striking out par. (1) which referred to section 1202 for deduction for long-term capital gains in the case of a taxpayer other than a corporation, and striking out par. (2) designation.
- 1981—Pub. L. 97-34 successively renumbered sections 221 and 222 of this title as this section.
- 1976—Pub. L. 94-455 renumbered section 220 of this title as this section.
- 1974—Pub. L. 93-406 renumbered section 219 of this title as this section.
- 1971—Pub. L. 92-178 renumbered section 218 of this title as this section.

1964—Pub. L. 88-272 renumbered section 217 of this title as this section.

## EFFECTIVE DATE OF 2003 AMENDMENT

Amendment by Pub. L. 108-173 applicable to taxable years beginning after Dec. 31, 2003, see section 1201(k) of Pub. L. 108-173, set out as a note under section 62 of this title.

## EFFECTIVE AND TERMINATION DATES OF 2001 AMENDMENT

Amendment by Pub. L. 107-16 applicable to payments made in taxable years beginning after Dec. 31, 2001, see section 431(d) of Pub. L. 107-16, set out as a note under section 62 of this title.

Amendment by Pub. L. 107-16 inapplicable to taxable, plan, or limitation years beginning after Dec. 31, 2012, and the Internal Revenue Code of 1986 to be applied and administered to such years as if such amendment had never been enacted, see section 901 of Pub. L. 107-16, set out as a note under section 1 of this title.

## EFFECTIVE DATE OF 1986 AMENDMENT

Amendment by section 301(b)(5)(A) of Pub. L. 99-514 applicable to taxable years beginning after Dec. 31, 1986, see section 301(c) of Pub. L. 99-514, set out as a note under section 62 of this title.

## SAVINGS PROVISION

For provisions that nothing in amendment by section 11802(e)(2) of Pub. L. 101-508 be construed to affect treatment of certain transactions occurring, property acquired, or items of income, loss, deduction, or credit taken into account prior to Nov. 5, 1990, for purposes of determining liability for tax for periods ending after Nov. 5, 1990, see section 11821(b) of Pub. L. 101-508, set out as a note under section 45K of this title.

## PART VIII—SPECIAL DEDUCTIONS FOR CORPORATIONS

- |       |  |
|-------|--|
| Sec.  |  |
| 241.  | Allowance of special deductions.   |
| [242. | Repealed.]   |
| 243.  | Dividends received by corporations.  |
| 244.  | Dividends received on certain preferred stock.                               |
| 245.  | Dividends received from certain foreign corporations.                        |
| 246.  | Rules applying to deductions for dividends received.                         |
| 246A. | Dividends received deduction reduced where portfolio stock is debt financed. |
| 247.  | Dividends paid on certain preferred stock of public utilities.               |
| 248.  | Organizational expenditures.   |
| 249.  | Limitation on deduction of bond premium on repurchase.                       |
| [250. | Repealed.]   |

## AMENDMENTS

- 1990—Pub. L. 101-508, title XI, § 11801(b)(4), Nov. 5, 1990, 104 Stat. 1388-522, struck out item 250 "Certain payments to the National Railroad Passenger Corporation".
- 1984—Pub. L. 98-369, div. A, title I, § 51(b), July 18, 1984, 98 Stat. 564, added item 246A.
- 1976—Pub. L. 94-455, title XIX, § 1901(b)(1)(AA), Oct. 4, 1976, 90 Stat. 1792, struck out item 242 "Partially tax-exempt interest".
- 1970—Pub. L. 91-518, title IX, § 901(b), Oct. 30, 1970, 84 Stat. 1342, added item 250.
- 1969—Pub. L. 91-172, title IV, § 414(b), Dec. 30, 1969, 83 Stat. 613, added item 249.

## § 241. Allowance of special deductions

In addition to the deductions provided in part VI (sec. 161 and following), there shall be allowed as deductions in computing taxable income the items specified in this part.

effect on or after the date of the enactment of this Act [June 7, 2001].

“(2) TRANSITION.—Until such time as the Secretary of the Treasury issues regulations under sections 4980F(e)(2) and (3) of the Internal Revenue Code of 1986, and section 204(h) of the Employee Retirement Income Security Act of 1974 [29 U.S.C. 1054(h)], as added by the amendments made by this section, a plan shall be treated as meeting the requirements of such sections if it makes a good faith effort to comply with such requirements.

“(3) SPECIAL NOTICE RULE.—

“(A) IN GENERAL.—The period for providing any notice required by the amendments made by this section shall not end before the date which is 3 months after the date of the enactment of this Act.

“(B) REASONABLE NOTICE.—The amendments made by this section shall not apply to any plan amendment taking effect on or after the date of the enactment of this Act if, before April 25, 2001, notice was provided to participants and beneficiaries adversely affected by the plan amendment (and their representatives) which was reasonably expected to notify them of the nature and effective date of the plan amendment.”

**§ 4980G. Failure of employer to make comparable health savings account contributions**

**(a) General rule**

In the case of an employer who makes a contribution to the health savings account of any employee during a calendar year, there is hereby imposed a tax on the failure of such employer to meet the requirements of subsection (b) for such calendar year.

**(b) Rules and requirements**

Rules and requirements similar to the rules and requirements of section 4980E shall apply for purposes of this section.

**(c) Regulations**

The Secretary shall issue regulations to carry out the purposes of this section, including regulations providing special rules for employers who make contributions to Archer MSAs and health savings accounts during the calendar year.

**(d) Exception**

For purposes of applying section 4980E to a contribution to a health savings account of an employee who is not a highly compensated employee (as defined in section 414(q)), highly compensated employees shall not be treated as comparable participating employees.

(Added Pub. L. 108-173, title XII, § 1201(d)(4)(A), Dec. 8, 2003, 117 Stat. 2478; amended Pub. L. 109-432, div. A, title III, § 306(a), Dec. 20, 2006, 120 Stat. 2951.)

AMENDMENTS

2006—Subsec. (d). Pub. L. 109-432 added subsec. (d).

EFFECTIVE DATE OF 2006 AMENDMENT

Pub. L. 109-432, div. A, title III, § 306(b), Dec. 20, 2006, 120 Stat. 2951, provided that: “The amendment made by this section [amending this section] shall apply to taxable years beginning after December 31, 2006.”

EFFECTIVE DATE

Section applicable to taxable years beginning after Dec. 31, 2003, see section 1201(k) of Pub. L. 108-173, set out as an Effective Date of 2003 Amendment note under section 62 of this title.

**§ 4980H. Shared responsibility for employers regarding health coverage**

**(a) Large employers not offering health coverage**

If—

(1) any applicable large employer fails to offer to its full-time employees (and their dependents) the opportunity to enroll in minimum essential coverage under an eligible employer-sponsored plan (as defined in section 5000A(f)(2)) for any month, and

(2) at least one full-time employee of the applicable large employer has been certified to the employer under section 1411 of the Patient Protection and Affordable Care Act as having enrolled for such month in a qualified health plan with respect to which an applicable premium tax credit or cost-sharing reduction is allowed or paid with respect to the employee,

then there is hereby imposed on the employer an assessable payment equal to the product of the applicable payment amount and the number of individuals employed by the employer as full-time employees during such month.

**(b) Large employers offering coverage with employees who qualify for premium tax credits or cost-sharing reductions**

**(1) In general**

If—

(A) an applicable large employer offers to its full-time employees (and their dependents) the opportunity to enroll in minimum essential coverage under an eligible employer-sponsored plan (as defined in section 5000A(f)(2)) for any month, and

(B) 1 or more full-time employees of the applicable large employer has been certified to the employer under section 1411 of the Patient Protection and Affordable Care Act as having enrolled for such month in a qualified health plan with respect to which an applicable premium tax credit or cost-sharing reduction is allowed or paid with respect to the employee,

then there is hereby imposed on the employer an assessable payment equal to the product of the number of full-time employees of the applicable large employer described in subparagraph (B) for such month and an amount equal to ½ of \$3,000.

**(2) Overall limitation**

The aggregate amount of tax determined under paragraph (1) with respect to all employees of an applicable large employer for any month shall not exceed the product of the applicable payment amount and the number of individuals employed by the employer as full-time employees during such month.

**(c) Definitions and special rules**

For purposes of this section—

**(1) Applicable payment amount**

The term “applicable payment amount” means, with respect to any month, ½ of \$2,000.

**(2) Applicable large employer**

**(A) In general**

The term “applicable large employer” means, with respect to a calendar year, an

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employer who employed an average of at least 50 full-time employees on business days during the preceding calendar year.

**(B) Exemption for certain employers**

**(i) In general**

An employer shall not be considered to employ more than 50 full-time employees if—

(I) the employer's workforce exceeds 50 full-time employees for 120 days or fewer during the calendar year, and

(II) the employees in excess of 50 employed during such 120-day period were seasonal workers.

**(ii) Definition of seasonal workers**

The term "seasonal worker" means a worker who performs labor or services on a seasonal basis as defined by the Secretary of Labor, including workers covered by section 500.20(s)(1) of title 29, Code of Federal Regulations and retail workers employed exclusively during holiday seasons.

**(C) Rules for determining employer size**

For purposes of this paragraph—

**(i) Application of aggregation rule for employers**

All persons treated as a single employer under subsection (b), (c), (m), or (o) of section 414 of the Internal Revenue Code of 1986 shall be treated as 1 employer.

**(ii) Employers not in existence in preceding year**

In the case of an employer which was not in existence throughout the preceding calendar year, the determination of whether such employer is an applicable large employer shall be based on the average number of employees that it is reasonably expected such employer will employ on business days in the current calendar year.

**(iii) Predecessors**

Any reference in this subsection to an employer shall include a reference to any predecessor of such employer.

**(D) Application of employer size to assessable penalties**

**(i) In general**

The number of individuals employed by an applicable large employer as full-time employees during any month shall be reduced by 30 solely for purposes of calculating—

(I) the assessable payment under subsection (a), or

(II) the overall limitation under subsection (b)(2).

**(ii) Aggregation**

In the case of persons treated as 1 employer under subparagraph (C)(i), only 1 reduction under subclause (I) or (II)<sup>1</sup> shall be allowed with respect to such persons and such reduction shall be allocated among

such persons ratably on the basis of the number of full-time employees employed by each such person.

**(E) Full-time equivalents treated as full-time employees**

Solely for purposes of determining whether an employer is an applicable large employer under this paragraph, an employer shall, in addition to the number of full-time employees for any month otherwise determined, include for such month a number of full-time employees determined by dividing the aggregate number of hours of service of employees who are not full-time employees for the month by 120.

**(3) Applicable premium tax credit and cost-sharing reduction**

The term "applicable premium tax credit and cost-sharing reduction" means—

(A) any premium tax credit allowed under section 36B,

(B) any cost-sharing reduction under section 1402 of the Patient Protection and Affordable Care Act, and

(C) any advance payment of such credit or reduction under section 1412 of such Act.

**(4) Full-time employee**

**(A) In general**

The term "full-time employee" means, with respect to any month, an employee who is employed on average at least 30 hours of service per week.

**(B) Hours of service**

The Secretary, in consultation with the Secretary of Labor, shall prescribe such regulations, rules, and guidance as may be necessary to determine the hours of service of an employee, including rules for the application of this paragraph to employees who are not compensated on an hourly basis.

**(5) Inflation adjustment**

**(A) In general**

In the case of any calendar year after 2014, each of the dollar amounts in subsection (b) and paragraph (1) shall be increased by an amount equal to the product of—

(i) such dollar amount, and

(ii) the premium adjustment percentage (as defined in section 1302(c)(4) of the Patient Protection and Affordable Care Act) for the calendar year.

**(B) Rounding**

If the amount of any increase under subparagraph (A) is not a multiple of \$10, such increase shall be rounded to the next lowest multiple of \$10.

**(6) Other definitions**

Any term used in this section which is also used in the Patient Protection and Affordable Care Act shall have the same meaning as when used in such Act.

**(7) Tax nondeductible**

For denial of deduction for the tax imposed by this section, see section 275(a)(6).

<sup>1</sup> So in original. Probably means subclause (I) or (II) of clause (i).

**(d) Administration and procedure**

**(1) In general**

Any assessable payment provided by this section shall be paid upon notice and demand by the Secretary, and shall be assessed and collected in the same manner as an assessable penalty under subchapter B of chapter 68.

**(2) Time for payment**

The Secretary may provide for the payment of any assessable payment provided by this section on an annual, monthly, or other periodic basis as the Secretary may prescribe.

**(3) Coordination with credits, etc.**

The Secretary shall prescribe rules, regulations, or guidance for the repayment of any assessable payment (including interest) if such payment is based on the allowance or payment of an applicable premium tax credit or cost-sharing reduction with respect to an employee, such allowance or payment is subsequently disallowed, and the assessable payment would not have been required to be made but for such allowance or payment.

(Added and amended Pub. L. 111-148, title I, §1513(a), title X, §§10106(e)-(f)(2), 10108(i)(1)(A), Mar. 23, 2010, 124 Stat. 253, 910, 914; Pub. L. 111-152, title I, §1003, Mar. 30, 2010, 124 Stat. 1033; Pub. L. 112-10, div. B, title VIII, §1858(b)(4), Apr. 15, 2011, 125 Stat. 169.)

**REFERENCES IN TEXT**

The Patient Protection and Affordable Care Act, referred to in subssecs. (a)(2), (b)(1)(B), and (c)(3)(B), (C), (5)(A)(ii), (6), is Pub. L. 111-148, Mar. 23, 2010, 124 Stat. 119. Sections 1302(c)(4), 1402, 1411, and 1412 of the Act are classified to sections 18022(c)(4), 18071, 18081, and 18082, respectively, of Title 42, The Public Health and Welfare. Section 10108 of the Act enacted former section 139D of this title and section 18101 of Title 42, amended sections 36B, 162, 4980H, 6056, and 6724 of this title and section 218b of Title 29, Labor, and enacted provisions set out as notes under sections 36B, 162, 4980H, and 6056 of this title and former section 139D of this title. For complete classification of this Act to the Code, see Short Title note set out under section 18001 of Title 42 and Tables.

**AMENDMENTS**

2011—Subsec. (b)(3). Pub. L. 112-10 struck out par. (3). Text read as follows: "No assessable payment shall be imposed under paragraph (1) for any month with respect to any employee to whom the employer provides a free choice voucher under section 10108 of the Patient Protection and Affordable Care Act for such month."

2010—Subsec. (b). Pub. L. 111-152, §1003(d), redesignated subsec. (c) as (b) and struck out former subsec. (b) which related to large employers with enrollment waiting periods exceeding 60 days.

Pub. L. 111-148, §10106(e), amended subsec. (b) generally. Prior to amendment, subsec. (b) related to large employers with enrollment waiting periods exceeding 30 days.

Subsec. (c). Pub. L. 111-152, §1003(d), redesignated subsec. (d) as (c). Former subsec. (c) redesignated (b).

Subsec. (c)(1). Pub. L. 111-152, §1003(b)(1), substituted "an amount equal to 1/2 of \$3,000" for "400 percent of the applicable payment amount" in concluding provisions.

Subsec. (c)(3). Pub. L. 111-148, §10108(i)(1)(A), added par. (3).

Subsec. (d). Pub. L. 111-152, §1003(d), redesignated subsec. (e) as (d). Former subsec. (d) redesignated (c).

Subsec. (d)(1). Pub. L. 111-152, §1003(b)(2), substituted "\$2,000" for "\$750".

Subsec. (d)(2)(D). Pub. L. 111-152, §1003(a), amended subpar. (D) generally. Prior to amendment, text read as follows: "In the case of any employer the substantial annual gross receipts of which are attributable to the construction industry—

"(i) subparagraph (A) shall be applied by substituting 'who employed an average of at least 5 full-time employees on business days during the preceding calendar year and whose annual payroll expenses exceed \$250,000 for such preceding calendar year' for 'who employed an average of at least 50 full-time employees on business days during the preceding calendar year', and

"(ii) subparagraph (B) shall be applied by substituting '5' for '50'."

Pub. L. 111-148, §10106(f)(2), added subpar. (D).

Subsec. (d)(2)(E). Pub. L. 111-152, §1003(c), added subpar. (E).

Subsec. (d)(4)(A). Pub. L. 111-148, §10106(f)(1), inserted "with respect to any month," after "means".

Subsec. (d)(5)(A). Pub. L. 111-152, §1003(b)(3), substituted "subsection (b) and paragraph (1)" for "subsection (b)(2) and (d)(1)" in introductory provisions.

Subsec. (e). Pub. L. 111-152, §1003(d), redesignated subsec. (e) as (d).

**EFFECTIVE DATE OF 2011 AMENDMENT**

Amendment by Pub. L. 112-10 effective as if included in the provisions of, and the amendments made by, the provisions of Pub. L. 111-148 to which it relates, see section 1858(d) of Pub. L. 112-10, set out as a note under section 36B of this title.

**EFFECTIVE DATE OF 2010 AMENDMENT**

Pub. L. 111-148, title X, §10106(f)(3), Mar. 23, 2010, 124 Stat. 911, provided that: "The amendment made by paragraph (2) [amending this section] shall apply to months beginning after December 31, 2013."

Pub. L. 111-148, title X, §10108(i)(1)(B), Mar. 23, 2010, 124 Stat. 914, provided that: "The amendment made by this paragraph [amending this section] shall apply to months beginning after December 31, 2013."

**EFFECTIVE DATE**

Pub. L. 111-148, title I, §1513(d), Mar. 23, 2010, 124 Stat. 256, provided that: "The amendments made by this section [enacting this section] shall apply to months beginning after December 31, 2013."

**§ 4980I. Excise tax on high cost employer-sponsored health coverage**

**(a) Imposition of tax**

If—

(1) an employee is covered under any applicable employer-sponsored coverage of an employer at any time during a taxable period, and

(2) there is any excess benefit with respect to the coverage,

there is hereby imposed a tax equal to 40 percent of the excess benefit.

**(b) Excess benefit**

For purposes of this section—

**(1) In general**

The term "excess benefit" means, with respect to any applicable employer-sponsored coverage made available by an employer to an employee during any taxable period, the sum of the excess amounts determined under paragraph (2) for months during the taxable period.

**(2) Monthly excess amount**

The excess amount determined under this paragraph for any month is the excess (if any) of—

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**Attachment 2**

PROPOSED AMENDMENTS TO HOUSE BILL NO. 1059

Page 1, line 22, after "for" insert "medical and hospital benefits"

Page 2, line 1, after "for" insert "medical and hospital benefits"

Page 2, line 2, replace "the" with "this"

Page 2, line 2, remove "being provided"

Renumber accordingly

Collins, J. Sparb

From: Murtha, Janilyn K.  
Sent: Tuesday, January 22, 2013 5:04 PM  
To: Collins, J. Sparb; Stockert, Cheryl L.  
Subject: HB 1059

Please accept this email in response to the following question:

Should "employer" be more clearly defined in North Dakota code for purposes of the Affordable Care Act?

To frame my response I offer the following observations regarding applicable sections of Chapter 54-52.1.

NDCC 54-52.1-03(1) extends the ability to participate in the uniform group insurance program to all "eligible employees".

Eligible employee is defined in NDCC 54-52.1-01(4) and includes "every permanent employee who is employed by a governmental unit, as that term is defined in section 54-52-01." NDCC 54-52-01(8) defines governmental unit as "the state of North Dakota, except the highway patrol for members of the retirement plan created under chapter 39-03.1, or a participating political subdivision thereof." NDCC 54-52.1-01(4) also states that eligible employee includes:

members of the legislative assembly, judges of the supreme court, paid members of state or political subdivision boards, commissions, or associations, full-time employees of political subdivisions, elective state officers as defined by subsection 2 of section 54-06-01, and disabled permanent employees who are receiving compensation from the North Dakota workforce safety and insurance fund. As used in this subsection, "permanent employee" means one whose services are not limited in duration, who is filling an approved and regularly funded position in a governmental unit, and who is employed at least seventeen and one-half hours per week and at least five months each year or for those first employed after August 1, 2003, is employed at least twenty hours per week and at least twenty weeks each year of employment. For purposes of sections 54-52.1-04.1, 54-52.1-04.7, 54-52.1-04.8, and 54-52.1-11, "eligible employee" includes retired and terminated employees who remain eligible to participate in the uniform group insurance program pursuant to applicable state or federal law.

A temporary employee is not included in the definition of an eligible employee, but is authorized to participate in the uniform group insurance program under NDCC 54-52.1-03.4.

These provisions identify who may participate in the uniform group insurance program; and as applied to state employees, these provisions do not distinguish between employees of individual departments or agencies in determining eligibility. A strict reading of the statute would suggest that for the purposes of providing health care coverage and identification of the employer under the ACA, the state is the employer for employees of state agencies or departments, and the employer for other participants is otherwise set forth in the definition of eligible employee.

While it doesn't appear a modification to Chapter 54-52.1 is needed to clarify who the employer is, the responsibility to properly notify employees of the right to receive coverage, does not fall generally with the state. Rather, under NDCC 54-52.1-03 (1)-(2), NDCC 54-52.1-03.4 as well as under NDAC 71-03-04-02 (for state employees) and 71-03-07-02 (for political subdivision employees) the respective employing state department or agency or political subdivision is responsible for informing employees of their right to participate in the group insurance program and the process necessary to enroll.

Compliance with the duty to offer coverage by the employing department, agency or political subdivision impacts compliance under the ACA, as an employer may be penalized for failure to offer an eligible employee coverage under certain circumstances. While the language of the ACA doesn't appear to specify whether the failure to offer coverage be intentional or inadvertent, a subsequent IRS publication indicates the employee must have had a meaningful opportunity to decline the coverage.

Other provisions of the ACA could also mitigate the calculation and assessment of penalties in the event of a failure to offer.

Please let me know if you would like to further discuss the penalty provisions of the ACA, or if you would like me to draft a change to Chapter 54-52.1.

Thank you,  
Janilyn

ACA provision

From the rating rules proposed rule from Nov 20, 2012:

“Proposed 45 CFR 147.102 would require issuers offering non-grandfathered health insurance coverage in the individual and small group markets starting in 2014, and the large group market *if such coverage is available through an Affordable Insurance Exchange (Exchange) starting in 2017*, to limit any variation in premiums with respect to a particular plan or coverage to age and tobacco use within limits, family size, and geography.”

Further:

“Proposed §156.80 generally would require health insurance issuers to treat all of their non-grandfathered business in the individual market and small group market, respectively, as a single risk pool. A state would have the authority to choose to direct issuers to merge their non-grandfathered individual and small group pools into a combined pool.”

Regarding the definition of small group, the ACA states in 1304:

“(b) Employers- In this title:

(1) LARGE EMPLOYER- The term ‘large employer’ means, in connection with a group health plan with respect to a calendar year and a plan year, an employer who employed an average of at least 101 employees on business days during the preceding calendar year and who employs at least 1 employee on the first day of the plan year.

(2) SMALL EMPLOYER- The term ‘small employer’ means, in connection with a group health plan with respect to a calendar year and a plan year, an employer who employed an average of at least 1 but not more than 100 employees on business days during the preceding calendar year and who employs at least 1 employee on the first day of the plan year.

(3) STATE OPTION TO TREAT 50 EMPLOYEES AS SMALL- *In the case of plan years beginning before January 1, 2016*, a State may elect to apply this subsection by substituting ‘51 employees’ for ‘101 employees’ in paragraph (1) and by substituting ‘50 employees’ for ‘100 employees’ in paragraph (2).”

Regarding “a State may elect”, the federally-facilitated exchange guidance from 5/16/2012 states:

“For purposes of FF-SHOP eligibility, HHS will adopt *State definitions* of the small group market in 2014 and 2015. HHS will count full-time equivalent employees to determine employer size consistent with the definitions in the Public Health Service Act as required by the law.”

Regarding transition timing:

“By law, issuers must transition all non-grandfathered small group and individual market coverage issued prior to January 1, 2014, to these adjusted community rating rules in the first plan year (small group market) or the first policy year (individual market) beginning on or after January 1, 2014, even if the issuers previously used other rating rules for products in these markets.”

**Implication**

The small group market will be 2-50 for 2014 & 2015, increase to 2-100 in 2016

**ND State law:**

54-52.1-03.1 NDCC If the political subdivision withdraws from participation in the uniform group insurance program, before completing sixty months of participation, the political subdivision shall make payment to the board in an amount equal to any expenses incurred in the uniform group insurance program that exceed income received on behalf of the political subdivision's employees as determined under rules adopted by the board.

**Concern**

Small political subs may be required to leave PERS and could incur a penalty as a result even though it is not their decision to leave.

20

PROPOSED AMENDMENTS TO HOUSE BILL NO. 1059

Page 1, line 1, after "sections" insert "54-52.1-03.1,"

Page 1, line 2, after "to" insert "withdrawal of a political subdivision from the uniform group insurance program,"

Page 1, after line 6, insert:

**"SECTION 1. AMENDMENT.** Section 54-52.1-03.1 of the North Dakota Century Code is amended and reenacted as follows:

**54-52.1-03.1. Certain political subdivisions authorized to join uniform group insurance program - Employer contribution.**

A political subdivision may extend the benefits of the uniform group insurance program under this chapter to its permanent employees, subject to minimum requirements established by the board and a minimum period of participation of sixty months. If the political subdivision withdraws from participation in the uniform group insurance program, before completing sixty months of participation, unless federal or state laws or rules are modified or interpreted in way that make participation by the political subdivision in the uniform group insurance program no longer allowable or appropriate, the political subdivision shall make payment to the board in an amount equal to any expenses incurred in the uniform group insurance program that exceed income received on behalf of the political subdivision's employees as determined under rules adopted by the board. The Garrison Diversion Conservancy District, and district health units required to participate in the public employees retirement system under section 54-52-02, shall participate in the uniform group insurance program under the same terms and conditions as state agencies. A retiree who has accepted a retirement allowance from a participating political subdivision's retirement plan may elect to participate in the uniform group under this chapter without meeting minimum requirements at age sixty-five, when the employee's spouse reaches age sixty-five, upon the receipt of a benefit, when the political subdivision joins the uniform group insurance plan if the retiree was a member of the former plan, or when the spouse terminates employment. If a retiree or surviving spouse does not elect to participate at the times specified in this section, the retiree or surviving spouse must meet the minimum requirements established by the board. Each retiree or surviving spouse shall pay directly to the board the premiums in effect for the coverage then being provided. The board may require documentation that the retiree has accepted a retirement allowance from an eligible retirement plan other than the public employees retirement system."

Renumber accordingly

1659 #2

**NDLA, Intern 09 - Wallace, Carrie**

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**From:** Kasper, Jim M.  
**Sent:** Thursday, January 24, 2013 4:19 PM  
**To:** NDLA, Intern 09 - Wallace, Carrie  
**Subject:** FW: OMB appropriations bill.

Carrie:

Please print and distribute to all committee members and email this to all committee members.

Thank you.

Jim

Rep. Jim Kasper  
ND House of Representatives  
District 46  
1128 Westrac Drive  
Fargo, ND 58103  
Office Phone: 701-232-6250  
Cell Phone: 701-799-9000  
State Email: [jkasper@nd.gov](mailto:jkasper@nd.gov)  
Bus. Email: [jmkasper@amg-nd.com](mailto:jmkasper@amg-nd.com)

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**From:** Anderson, Tag C.  
**Sent:** Thursday, January 24, 2013 4:06 PM  
**To:** Kasper, Jim M.  
**Cc:** Boehning, Randy G.  
**Subject:** OMB appropriations bill.

Chairman Kasper,

I misspoke when I told Sparb Collins that OMB's appropriations bill was 2015. It is HB 1015.

Sorry for the mistake.

Attachment 1

HB 1059  
February 6,  
2013

## TESTIMONY OF SPARB COLLINS

### HOUSE BILL 1059

Mr. Chairman, members of the committee, good morning my name is Sparb Collins and I am the Executive Director of the North Dakota Public Employees Retirement System. Today I appear before you in support of HB1059. This bill addresses two areas:

1. Compliance with the Affordable Care Act (ACA) (Section 1).
2. Participation by political subdivisions in the PERS High Deductible Health Plan (HDHP) (Section 2).

#### Section 1 - Compliance with the Affordable Care Act (ACA)

Section 1 of the 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 the Employer Shared Responsibility penalties with respect to its temporary employees under the Affordable Care Act. 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.

Section 1 of the 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)]."
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)], ...."

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.

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 technically could expose the State to Employer Shared Responsibility penalties. However, the safe harbors outlined in IRS Notice 2012-58 will allow the State to avoid this problem.

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.

The above changes should insure that the state complies with the shared responsibilities rules without changing our definition of full time employees that are eligible for 100% payment of their health insurance premium. Consequently, the fiscal note on this indicates the estimated cost of this change is \$2,000,000 with 50% coming from the general fund and 50% coming from other funds. This also assumes that the State, as the employer will use a 12 month look-back period for determining eligibility.

### **Section 2 - Political Subdivision Participation in High Deductible Health Plan (HDHP)**

Section 2 of the bill would amend Section 54-52.1-18 of the North Dakota Century Code relating to the high-deductible health plan alternative and clarifies political subdivision participation in the plan. Specifically, it provides 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. Secondly, it allows political subdivisions to directly retain the HSA vendor for its employees. It is felt that these changes will allow this option to operate more efficiently and will facilitate the political subs participation in the HDHP.

Mr. Chairman, members of the committee this bill was reviewed by the Legislative Employee Benefits Committee and given no recommendation. At the time of the Committee's review, they felt that additional information on the ACA would be available at a later date.

Thank you and this concludes my testimony.

**EMPLOYEE BENEFITS PROGRAMS COMMITTEE REPORT  
TO THE 63RD LEGISLATIVE ASSEMBLY REGARDING HOUSE BILL NO. 1059**

**Sponsor:** PERS Retirement Board

**Proposal:** Amends Section 54-52.1-03.4 to modify the uniform group insurance program eligibility rules for temporary employees first employed after December 31, 2013, and limits the amount any temporary employee can be required to contribute toward the cost of coverage. The purpose of this proposed change is to prevent the state from being subjected to employer-shared responsibility penalties with respect to its temporary employees under the federal Affordable Care Act. The bill also amends Section 54-52.1-18 relating to the high-deductible alternative to ensure the state's high-deductible health plan option can be offered to political subdivision employees and clarify political subdivisions are not required to make the same employer contribution to their employees' health savings accounts as the state is required to make to its employees' health savings accounts.

**Actuarial Analysis:** The consulting actuary reported the proposal would achieve the identified objectives.

**Committee Report:** No recommendation.

## TESTIMONY OF SPARB COLLINS

### ENGROSSED HOUSE BILL 1059

Mr. Chairman, members of the committee, good morning my name is Sparb Collins and I am the Executive Director of the North Dakota Public Employees Retirement System. Today I appear before you in support of HB1059. This bill addresses two areas:

1. Compliance with the Affordable Care Act (ACA) (Section 1 & 2).
2. Participation by political subdivisions in the PERS High Deductible Health Plan (HDHP) (Section 2).

#### **Section 1 – Compliance with the Affordable Care Act (ACA) – Political Subdivision Participation.**

Recent proposed rules relating to the ACA may require all non-grandfathered small groups to transition to adjusted community rated products. This could affect small public sector groups that participate in the PERS plan and could require them to leave the PERS plan. While we are not sure that this is the case, at this point we did notice in reviewing this possibility that one provision in our state law could present complications to a political subdivision that was required to leave. Specifically, 54-52.1-03.1 NDCC states that "If the political subdivision withdraws from participation in the uniform group insurance program, before completing sixty months of participation, the political subdivision shall make payment to the board in an amount equal to any expenses incurred in the uniform group insurance program that exceed income received on behalf of the political subdivision's employees as determined under rules adopted by the board". This provision was adopted to prevent adverse selection to the PERS plan from political subdivision participation elections. Specifically, if political subdivisions were to come into the plan and exit the plan based solely on good underwriting cycles and bad cycles, this could cause adverse selection to the plan thereby making bad underwriting cycles worse. The concern with applying this provision in this case which is not associated with adverse selection concerns is that a political subdivision that may be required to leave the plan pursuant to federal requirements could be exposed to penalties from the PERS plan. This may place additional hardships on the political subdivision. Consequently, the change in Section 1 proposes to waive any possible penalties under state law if the move is required under federal.

#### **Section 2 - Compliance with the Affordable Care Act (ACA) – Shared Responsibility Rules.**

Section 2 of the 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 the Employer Shared Responsibility penalties with respect to its temporary employees under the Affordable Care Act. 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.

Section 2 of the 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)].”
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)], ....”

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.

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 technically could expose the State to Employer Shared Responsibility penalties. However, the safe harbors outlined in IRS Notice 2012-58 will allow the State to avoid this problem.

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.

The above changes should insure that the state complies with the Shared Responsibilities rules without changing our definition of full-time employees that are eligible for 100% payment of their health insurance premium. Consequently, the fiscal



note on this indicates the estimated cost of this change is \$2,000,000 with 50% coming from the general fund and 50% coming from other funds. This also assumes that the State, as the employer will use a 12 month look-back period for determining eligibility.

**Section 3 - Political Subdivision Participation in High Deductible Health Plan (HDHP).**

Section 3 of the bill would amend Section 54-52.1-18 of the North Dakota Century Code relating to the high-deductible health plan alternative and clarifies political subdivision participation in the plan. Specifically, it provides 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. Secondly, it allows political subdivisions to directly retain the HSA vendor for its employees. It is felt that these changes will allow this option to operate more efficiently and will facilitate the political subdivision's participation in the HDHP.

Mr. Chairman, members of the committee this bill was reviewed by the Legislative Employee Benefits Committee and given no recommendation. At the time of the Committee's review, they felt that additional information on the ACA would be available at a later date.



Thank you and this concludes my testimony.

#1  
08-28-13  
HB 1059

**TESTIMONY OF SPARB COLLINS**  
**ENGROSSED HOUSE BILL 1059**

Mr. Chairman, members of the committee, good morning my name is Sparb Collins and I am the Executive Director of the North Dakota Public Employees Retirement System. Today I appear before you in support of HB1059. This bill addresses two areas:

1. Compliance with the Affordable Care Act (ACA) (Section 1 & 2). Section 2 related to the fiscal note
2. Participation by political subdivisions in the PERS High Deductible Health Plan (HDHP) (Section 2).

**Section 1 – Compliance with the Affordable Care Act (ACA) – Political Subdivision Participation.**

Recent proposed rules relating to the ACA may require all non-grandfathered small groups to transition to adjusted community rated products. This could affect small public sector groups that participate in the PERS plan and could require them to leave the PERS plan. While we are not sure that this is the case, at this point we did notice in reviewing this possibility that one provision in our state law could present complications to a political subdivision that was required to leave. Specifically, 54-52.1-03.1 NDCC states that "If the political subdivision withdraws from participation in the uniform group insurance program, before completing sixty months of participation, the political subdivision shall make payment to the board in an amount equal to any expenses incurred in the uniform group insurance program that exceed income received on behalf of the political subdivision's employees as determined under rules adopted by the board". This provision was adopted to prevent adverse selection to the PERS plan from political subdivision participation elections. That is, if political subdivisions were to come into the plan and exit the plan based solely on good underwriting cycles and bad cycles, this could cause adverse selection to the plan thereby making bad underwriting cycles worse. The concern with applying this provision in this case which is that a political subdivision that may be required to leave the plan pursuant to federal requirements could be exposed to penalties from the PERS plan. This may place additional hardships on the political subdivision. Consequently, the change in Section 1 proposes to waive any possible penalties under state law if the move is required under federal.

**Section 2 - Compliance with the Affordable Care Act (ACA) – Shared Responsibility Rules.**

Section 2 of the 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 the Employer Shared Responsibility penalties with respect to its temporary employees under the Affordable Care Act. 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.

Section 2 of the 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)].”
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)], ....”

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.

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.

The above changes should insure that the state complies with the Shared Responsibilities rules without changing our definition of full-time employees that are eligible for 100% payment of their health insurance premium. Consequently, the fiscal note on this indicates the estimated cost of this change is \$2,000,000 with 50% coming from the general fund and 50% coming from other funds. This also assumes that the State, as the employer will use a 12 month look-back period for determining eligibility. The appropriation for this was in the OMB bill but it is my understanding that it was removed by the House. Consequently at this point if this bill was passed no funding is being provided to agencies to pay the additional premium required.

**Section 3 - Political Subdivision Participation in High Deductible Health Plan (HDHP).**

Section 3 of the bill would amend Section 54-52.1-18 of the North Dakota Century Code relating to the high-deductible health plan alternative and clarifies political subdivision participation in the plan. Specifically, it provides 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. Secondly, it allows political subdivisions to directly retain the HSA vendor for its employees. It is felt that these changes will allow this option to operate more efficiently and will facilitate the political subdivision's participation in the HDHP.

Mr. Chairman, members of the committee this bill was reviewed by the Legislative Employee Benefits Committee and given no recommendation. At the time of the Committee's review, they felt that additional information on the ACA would be available at a later date.

Thank you and this concludes my testimony.