

September 6, 2016

The Honorable Jacob J. Lew
Secretary
U.S. Department of the Treasury
1500 Pennsylvania Avenue, NW
Washington, D.C. 20220

The Honorable Thomas E. Perez
Secretary
U.S. Department of Labor
200 Constitution Avenue, NW, Room S-2018
Washington, D.C. 20210

The Honorable Sylvia Mathews Burwell
Secretary
U.S. Department of Health and Human Services
Hubert H. Humphrey Building
200 Independence Avenue, SW
Washington, D.C. 20201

Dear Secretary Lew, Secretary Perez, and Secretary Burwell:

On behalf of the higher education associations listed below, I write to follow up in regard to a letter that a number of senators sent to you in late June seeking a permanent solution to allow universities to continue their longstanding practice of providing student health insurance, at little or no cost, to graduate students. The senators' letter was written in response to regulatory guidance issued by each of your Departments on February 5, 2016, which concluded that colleges and universities that offer subsidized student health insurance plans (SHIPs) for graduate students (and, in many cases, their partners and dependents) are in violation of the Affordable Care Act (ACA). See IRS Notice 2016-17. The guidance indicated that this practice will no longer be permitted based on the agencies' interpretation of the ACA for students providing teaching, research, or other services to a university. Thankfully, the guidance at least provided "temporary transition relief" so that institutions can continue providing this form of coverage without penalty through the 2016–17 academic year.

However, the guidance disregards language in the ACA requiring the preservation of student health coverage and incorrectly categorizes graduate students as employees under the common law definition of employment. In so doing, the guidance conflicts with and undermines a primary goal of the ACA: namely, to ensure widespread availability of affordable, comprehensive health insurance. It also undercuts the Administration's significant efforts to increase access to higher education, as disallowing this kind of student coverage will add to the cost of education.

Accordingly, we write today to urge you to issue guidance consistent with section 1560(a) of the ACA that will permit universities to continue to provide subsidized student health insurance coverage to their graduate students without risk of penalty.

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Prior to the issuance of the guidance, we discussed the issue at length and in good faith with officials in your Departments. Nevertheless, to our dismay, the guidance falls far short of the higher education community's goal to resolve this matter in a manner that permits schools to continue providing subsidized student health insurance to their graduate students. As it stands, the guidance will harm graduate students, because schools will be forced to end or significantly alter their efforts to make affordable health coverage available for such students. Indeed, by limiting such access to affordable coverage, the guidance will undermine the student health insurance market overall, which could adversely affect all students, including undergraduates.

Schools provide subsidized coverage to graduate students because of their status as students enrolled in an academic program. The contribution is a form of scholarship aid intended to lower the cost of graduate education. SHIPs are ACA-compliant and offer outstanding coverage – typically at the “Gold” or “Platinum” levels – that satisfy the “minimum essential coverage” requirements with broad comprehensive benefits, often including vision and dental coverage. These plans typically cost half that of comparable employee plans. Moreover, SHIPs are better and less costly than plans available on the individual market precisely because they have been tailored to the needs and lifestyles of students, including benefits such as enhanced mental health benefits, global emergency medical and travel assistance, emergency medical evacuation and repatriation benefits, as well as low co-pays and deductibles and, frequently, an accessible medical home. In recognition of the value of such student health insurance coverage, the ACA explicitly protects the right of colleges and universities to continue offering SHIP coverage. Specifically, the ACA provides that “[n]othing in this title shall . . . be construed to prohibit an institution of higher education . . . from offering a student health insurance plan, to the extent that such requirement is otherwise permitted under applicable Federal, State or local law.” See 26 U.S.C. § 1560(a). In fact, the Department of Health and Human Services (HHS) previously issued regulations governing SHIP coverage to protect the ability of institutions of higher education to offer student health plans. See 77 Fed. Reg. 16453 (Mar. 21, 2012) (to be codified at 45 C.F.R. pts. 144, 147 and 158).

Notice 2017-16 is inconsistent with the long-standing interpretation by the Department of Labor's (DOL) Wage and Hour Division concerning students under the Fair Labor Standards Act (FLSA). Based on a broader definition of employment than the common law, DOL has long viewed a range of students engaged in activities related to their academic programs, including graduate research assistants, as being in an “educational relationship” not an “employment relationship with . . . the school,” and therefore not subject to the FLSA's wage and hour requirements. This even includes a graduate Ph.D. candidate receiving a stipend subject to federal income taxes and health insurance from a university. See Department of Labor Wage and Hour Division, “Guidance for Higher Education Institutions on Paying Overtime under the Fair Labor Standards Act,” pp. 8-9 (May 18, 2016).

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The guidance is also at odds with the approach taken in IRS regulations implementing the Student FICA and the Federal Unemployment tax exceptions. According to those regulations, students working fewer than 40 hours per week will be exempt from “employment” for FICA and Federal Unemployment taxes if they are engaged in paid services to an institution where the educational aspects of the services are “predominant” and “incident to and for the purposes of pursuing a course of study.” See 26 CFR § 31.3121(b)(10)-2. The regulations cite, among numerous examples, a graduate teaching assistant, receiving a stipend and other benefits, who is charged with various instructional related duties (e.g. grading, classroom and laboratory instruction) normally amounting to 20 hours per week and who works occasional periods in excess of 40 hours, as appropriately exempt from employment taxes. *Id.* at *Example 8*.

While we commend your Departments for providing temporary transition relief in the guidance, there remains an urgent need to resolve this issue expeditiously. Colleges and universities have already begun negotiating the terms and costs of their student health insurance coverage for academic year 2017-18. Thousands of graduate students at campuses across the country could potentially be affected, costing students and schools millions of dollars. Moreover, because schools subsidize SHIP coverage for graduate students, they typically constitute the largest pool of insureds, often numbering in the thousands, under a SHIP plan at a university. In turn, by broadening the pool of insureds, this helps spread the risk, making the cost of comprehensive SHIP coverage less expensive for all students, including undergraduates. As a result, if schools are no longer permitted to provide subsidized coverage for graduate students, the number of insureds will drop, likely driving up the cost of coverage and could result in the loss of student health insurance coverage for all students.

As an alternative to the approach set out in the guidance, we respectfully recommend that the Departments consider the following alternatives:

1. Relying on the DOL FLSA and the IRS Student FICA and Unemployment frameworks, define students providing services to their institution for fewer than 30 hours per week that are *predominantly educational* and *incident to and for the purposes of pursuing a course of study* as students, not employees, under the ACA;
2. Consistent with approach adopted by HHS in the SHIP regulations, apply ACA section 1560 to permit schools to continue providing graduate students with subsidized SHIP coverage; or,
3. Given the complexity of the issue and the urgent need to resolve it, the regulators could provide schools with ongoing transitional relief, at least temporarily, to permit schools time to seek a statutory change to resolve the issue in the next Congress.

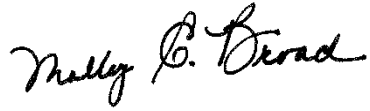
As you review this issue, we look forward to working with you to answer your questions or concerns. Thank you for your consideration of this important matter.

Higher Education letter on graduate student health insurance subsidies

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Sincerely,

A handwritten signature in black ink that reads "Molly C. Broad". The signature is written in a cursive, flowing style.

Molly Corbett Broad
President

MCB/ldw

On behalf of:

American College Health Association

American Council on Education

Association of American Universities

Association of Public and Land-grant Universities

College and University Professional Association for Human Resources

Council of Graduate Schools

National Association of Independent Colleges and Universities