In the Appeal of:  [Redacted]
For:  Employer Shared Responsibility
Agency:  MNsure Board
Docket:  185786

On February 21, 2017, Appeals Examiner Ruth Grunke Klein concluded a desk review of documentary evidence in an Employer Shared Responsibility appeal under Minnesota Rules, part 7700.0105, subpart 1, item A(7).¹

The Appeals Examiner, based on the evidence in the record, recommends the following Findings of Fact, Conclusions of Law, and Order.

¹ Employer Shared Responsibility appeals are also governed by 42 U.S.C. §§ 18081(e)(4)(c) and 18081(f)(2); 45 C.F.R. §§ 155.310 and 155.555; and Minn. Stat. § 62V.05.
STATEMENT OF ISSUE

The issue raised in this appeal is:

Whether the Agency accurately determined that the Appellant does not provide Minimum Essential Coverage through an employer-sponsored plan to the Employee.

FINDINGS OF FACT

1. **Procedural History.**
   a. On November 7, 2016, the MNsure agency ("Agency") sent [redacted] ("Appellant") an Employer Notice, informing Appellant that [redacted] ("Employee") was reported to be its employee, and was determined by the Agency to be eligible for Advance Premium Tax Credits. *Agency Exhibit 1*. The Notice further informed Appellant that, as a result of the determination, it may be liable to the U.S. Department of the Treasury for a payment assessed under the Employer Shared Responsibility provisions of the Internal Revenue Code. *Id.* The Notice also clarified that it is the Internal Revenue Service, and not the Agency, that determines any employer liability under the Employer Shared Responsibility provisions. *Id.*
   b. In response to the Employer Notice, Appellant’s representative filed an appeal request that was received by the Appeals Office on December 7, 2016. *Appellant Exhibit A.*
   c. On December 13, 2016, Appeals Examiner Ruth Grunke Klein notified the Agency, Appellant, and the Employee that the appeal request would be addressed through a desk review of evidence, and requested evidence from all parties. On January 27, 2017, the Appeals Examiner requested additional evidence from all parties. On February 13, 2017, the record was closed consisting of seven exhibits.²

2. **Employment Relationship.** It is undisputed that the Employee, who was born on [redacted], [redacted], is employed by Appellant, and was employed by Appellant when he completed an application on the MNsure website for health coverage with discounts. *Agency Exhibit 1; Appellant Exhibits A, B, and C; Employee Exhibits A and B.*

3. **Agency Determination of Eligibility for Advance Premium Tax Credits.**
   
a. On December 28, 2015, the Employee applied through the Minnesota Eligibility Technology System for health insurance. *Agency Exhibit 1.* On November 7, 2016, the Agency redetermined eligibility through its eligibility system, and determined the Employee eligible for Advance Premium Tax Credits, effective December 1, 2016. *Id.*

   b. This determination was based on information provided by the Employee. *Agency Exhibit 1.* The Employee attested that Appellant is his employer, and that he is not enrolled in insurance coverage offered by Appellant. *Id.* In addition, the Employee attested that the insurance offered by Appellant was unaffordable. *Id.*

4. **Affordability of Employer-Sponsored Coverage.**
   
a. I find that the coverage was not affordable to the Employee, who is 55 years old. Appellant and the Employee noted that Appellant paid $325 monthly toward an employee’s employer-sponsored coverage, and that the total monthly cost of the least expensive plan for employee only 2016 coverage was $898.23 for a 55-year-old, and the total cost of the least expensive plan for employee only 2017 coverage was $894.75 for a 55-year-old. *Appellant Exhibit B.* Thus, for 2017, the Employee would have had to pay $569.75 monthly, or $6,837 annually, to enroll in the least expensive plan. Appellant’s and the Employee’s projection of 2017 income differed. Appellant’s 2017 income projection for Employee, the greater of the two, was $39,200 *Appellant Exhibit C.* The plan’s affordability is determined by dividing the Employee’s share of the annual premium for employee-only enrollment ($6,837) by the projected annual income for the Employee’s household ($39,200). In this case, the result is that the plan would take up 17.44 percent of the Employee’s projected household income, which well exceeds the affordability limit of 9.66 percent detailed below.

   b. It should be noted that the amount used in the affordability calculation above is the Appellant’s 2017 income projection, which is greater than the Employee’s 2017 income projection, and is the amount that would lead to a result most favorable to the Appellant. Additionally, the 2017 monthly premium used, $894.75, is less than the 2016 monthly premium amount, which is also the amount that is most advantageous to the Appellant. These amounts are used for the sake of analysis only, so that the result is based on the facts as viewed in the light most favorable to the Appellant.

CONCLUSIONS OF LAW

1. **Jurisdiction.**
   
a. The MNsure Board of Directors (“MNsure Board”) has the legal authority to consider and decide an appeal by an employer that receives a notice under Code of Federal Regulations, title 45, section 155.310(h), of the Agency’s determination that the employer does not provide Minimum Essential Coverage or that provided coverage is not affordable to an employee. 42 U.S.C. § 18081(f)(2); 45 C.F.R. §
b. The MNsure Board also has the authority to enter into agreements with state agencies to conduct appeal hearings, and currently has such an agreement with the Minnesota Department of Human Services. Minn. Stat. § 62V.05, subd. 6(b); 45 C.F.R. §§ 155.555(b) and 155.510(a).

c. For an appeal request to be considered, it must be requested by the employer within 90 days from the date the Employer Notice was sent. 45 C.F.R. § 155.555(c)(1).

d. In this case, the Appellant’s appeal request was submitted in response to an Employer Notice issued under 45 C.F.R. § 155.310(h), and therefore addresses a subject matter the MNsure Board has jurisdiction to consider. In addition, the appeal was requested fewer than 90 days from the date the Employer Notice was sent, so the appeal is timely.

2. Scope of Appeal.

a. Right to Appeal. The Agency must notify an employer when an employee has been determined eligible for Advance Premium Tax Credits or Cost-Sharing Reductions, which reduce the cost of qualified health plans available from the MNsure marketplace. 45 C.F.R. § 155.310(h). Such notice must identify the employee; indicate that the employee has been found eligible for Advance Premium Tax Credits; indicate that the employer may be liable for an Employer Shared Responsibility payment under Section 4980H of the Internal Revenue Code; and notify the employer of its right to appeal the determination. Id. In order for the Agency to determine an applicant eligible for Advance Premium Tax Credits, it must determine that the applicant’s employer does not provide Minimum Essential Coverage through an employer-sponsored plan, or that the coverage is not affordable. This is due to Advance Premium Tax Credits eligibility requirements detailed below. The employer may then appeal the Agency’s determination that it does not provide Minimum Essential Coverage, or that the coverage is not affordable to an employee. 45 C.F.R. § 155.555(a).

b. Effect on Employer. A determination made in this appeal is not a determination of liability for, or immunity from, Employer Shared Responsibility payments. Although this appeal involves the requirement of certain employers to offer Minimum Essential Coverage to certain employees, liability under the Employer Shared Responsibility provisions is determined solely by the Internal Revenue Service, pursuant to 26 U.S.C. § 4980H. In addition, this appeal request and the determination made in this

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3 As noted above, the notice is required whenever an employee is eligible for Advance Premium Tax Credits or Cost-Sharing Reductions. 45 C.F.R. § 155.310(h). However, the requirements for Cost-Sharing Reductions eligibility are the same as Advance Premium Tax Credits eligibility, except with a lower income limit. See, 42 U.S.C. § 18081. As such, all applicants determined eligible for Cost-Sharing Reductions are also eligible for Advance Premium Tax Credits. Id. Therefore, the notice only requires informing the employer of Advance Premium Tax Credits eligibility (45 C.F.R. § 155.310(h)(2)), and the remainder of this decision focuses on the Employee’s Advance Premium Tax Credits eligibility.
appeal do not foreclose any appeal right the employer may have under Subtitle F of the Internal Revenue Code, relating to the procedural and administrative requirements of the U.S. tax system. 45 C.F.R. § 155.555(k)(1)(ii).

c. Effect on Employee. A determination made in this appeal may result in a redetermination by the Agency of the employee’s and/or household members’ eligibility for Advance Premium Tax Credits and/or Cost-Sharing Reductions. However, the appeal decision itself does not directly have that effect. Instead, the Agency would be required to make a separate redetermination of eligibility for Advance Premium Tax Credits or Cost-Sharing Reductions under 45 C.F.R. § 155.330. If that occurs, the employee has a separate right to appeal that redetermination, and the employee must be notified of the right to appeal when any redetermination is made. 45 C.F.R. §§ 155.555(k)(2)(ii) and 155.515; 42 U.S.C. § 18081(f); Minn. Stat. § 62V.05, subd. 6.

   a. Where federal law or regulation does not require a hearing and allows for a desk review of documentary evidence, a hearing will only be provided when the Appeals Examiner determines that it would materially assist in resolving the issues presented by the appeal. Minn. R. § 7700.0105, subp. 5(C).
   b. In this case, the provisions of the relevant federal law and regulation do not require a hearing. See, 42 U.S.C. § 18081(f)(2); 45 C.F.R. § 155.555(g). Further, the Appeals Examiner has concluded that a desk review of documentary evidence is sufficient to resolve the issues presented by the appeal.

   a. Some individuals and families who purchase a qualified health plan from the MNSure marketplace will receive a federal tax credit to reduce the cost of the insurance premium. Although the final amount of the tax credit an individual or family receives is determined through the federal income tax filing process, advance payment of the tax credit is available to those who the Agency determines qualify. The advance payments are referred to as Advance Premium Tax Credits. 26 C.F.R. § 1.36B.
   b. The Agency must determine an applicant’s eligibility for Advance Premium Tax Credits. 45 C.F.R. § 155.310(d)(1). Eligibility requires that the applicant:

   • is a U.S. Citizen or National, or is a lawfully present non-citizen;
   • is a legal resident of Minnesota (including those temporarily absent);
   • is not incarcerated;
   • has household income that does not exceed 400 percent of the Federal Poverty Guideline for the year preceding the benefit year; and

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4 More information about eligibility appeals can be found online at www.mnsure.org/help/appeals.
• is part of a tax-filing household and will file taxes jointly if married.
45 C.F.R. §§ 155.305(a), 155.305(f)(1)(i), and 155.310(d)(2)(ii).

c. In addition, eligibility for Advance Premium Tax Credits requires that the recipient is not eligible for other Minimum Essential Coverage, other than being eligible to obtain individual coverage through the private market. 45 C.F.R. § 155.305(f)(1)(ii)(B). Minimum Essential Coverage includes government-sponsored insurance programs (such as Medical Assistance, MinnesotaCare, Medicare, and certain veteran insurance programs). 26 U.S.C. § 5000A(f)(1)(A). Most relevant to this appeal, Minimum Essential Coverage also includes eligible employer-sponsored plans, addressed in the next section.

5. **Eligibility for Advance Premium Tax Credits – Employer Coverage.**
   a. **General Rule.** Eligible employer-sponsored coverage is broadly defined to include any group health plan offered by an employer to an employee (as well as related persons6) in the small or large group market within a state. 26 U.S.C. § 5000A(f)(2). However, in order for employer-sponsored coverage to be considered Minimum Essential Coverage (and thereby a barrier to Advance Premium Tax Credits eligibility), it must meet certain additional requirements. In particular, one of the following must be true at the time of the Advance Premium Tax Credits eligibility determination:
   - the employee (or related person) is enrolled in the employer coverage; or
   - the employee (or related person) is eligible to enroll in the employer-sponsored coverage, and the employer-sponsored coverage is both affordable and provides minimum value.
26 C.F.R. § 1.36B-2(c)(3)(i).

b. **Enrollment in Employer-Sponsored Coverage.** As noted above, when an employee or related person is enrolled in employer-sponsored coverage, he or she is enrolled in Minimum Essential Coverage. In other words, the requirements of affordability and minimum value do not apply to those enrolled in employer-sponsored coverage. 26 C.F.R. § 1.36B-2(c)(3)(vii)(A).

c. **Eligibility to Enroll in Employer-Sponsored Coverage.** An employee or related individual is not eligible for Minimum Essential Coverage under an employer plan during a required waiting period before the coverage becomes effective. 26 C.F.R. § 1.36B-2(c)(3)(iii)(B). On the other hand, an employee or related individual is deemed to be eligible to enroll in employer-sponsored coverage for a given month if he or she could have enrolled in the plan for that month during an open or special enrollment period, even if the enrollment period has since closed. 26 C.F.R. § 1.36B-2(c)(3)(iii)(A).

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6 In this context, a “related person” is anyone who may enroll in the plan because of a relationship to the employee. 26 C.F.R. § 1.36B-2(c)(3)(i).
d. **Affordability.** As noted above, for those who are not enrolled in employer-sponsored coverage, it is considered Minimum Essential Coverage only if the employee or related person is or was eligible to enroll in it, and it is both affordable and provides minimum value. 26 C.F.R. § 1.36B-2(c)(3)(i). To determine affordability, MNsure must consider the employee’s annual premium cost for the lowest-cost employer-sponsored plan for self-only coverage. The cost for “self-only coverage” means the premium cost to enroll only the employee. In other words, affordability considers only the premium the employee would pay if he or she enrolled individually, without enrolling a spouse, dependents, or other eligible persons. That cost is then compared to the household’s expected annual income. If the annual premium cost for the Employee does not exceed 9.66 percent of the household’s income, the employer-sponsored coverage is deemed affordable. This analysis is done as follows:

\[
\frac{\text{Employee’s share of annual premium for employee-only coverage}}{\text{Projected annual income for the household (not only the employee)}} = \text{Percentage of income for employee-only coverage}
\]

If the result exceeds 9.66 percent (or 0.0966), the coverage is deemed unaffordable to the employee, and the employee and eligible household members could qualify for Advance Premium Tax Credits if other eligibility requirements are satisfied. 26 C.F.R. § 1.36B-2(c)(3)(v)(A).

e. **Minimum Value.** As noted above, for those eligible for but not enrolled in employer-sponsored coverage, the plan is considered Minimum Essential Coverage only if it is both affordable and provides minimum value. Employer-sponsored coverage provides minimum value if the plan’s share (the share not paid by the employee) of the costs of benefits is 60 percent or more. 26 C.F.R. § 1.36B-2(c)(3)(vi). This does not necessarily mean that the plan would pay at least 60 percent of a specific employee’s costs, since the plan’s value is based on a comparison to the general population. See, 42 U.S.C. § 18022(d)(2).

6. **Employer Contributions to a Health Savings Account.** Guidance from the Internal Revenue Service outlines when employer contributions can be used to offset an employee’s required premium contribution to an employer-sponsored plan. See, generally, IRS Notice 2015-87. Although the Internal Revenue Service provides its analysis in the context of a Health Reimbursement Account, rather than a Health Savings Account, there is nothing in the analysis to suggest the latter would be analyzed differently. See, IRS Notice 2015-87 at Question 7. The guidance provides that the employer’s contributions are counted toward the employee’s required premium

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7 If the lowest-cost plan does not provide minimum value, then the affordability analysis instead uses the lowest-cost option that does provide minimum value.
8 The 9.66 percent limit applies only to the 2016 plan year. It is an indexed rate that changes each year to account for changes in insurance premiums compared to changes in income. It is sometimes referred to as the “required contribution percentage.” 26 C.F.R. § 1.36B-2(c)(3)(v)(C); Rev. Proc. 2014-62, Sect. 2.02.
contribution (thereby reducing his or her required premium contribution) only to the extent that the employer contribution can be used to pay for premium costs. *Id.* In other words, if those contributions cannot be used to pay the employee’s premium, they are not used in the affordability analysis to reduce the premium amount the employee would be required to pay. *Id.*

7. **Changes to Eligibility.** Those who enroll in a Qualified Health Plan through the MNsure marketplace must report changes related to eligibility to the Agency within 30 days of the change. 45 C.F.R. § 155.330(b)(1).

8. **Employer Shared Responsibility.**
   a. The Patient Protection and Affordable Care Act requires certain employers to offer certain employees Minimum Essential Coverage, or to pay an Employer Shared Responsibility tax payment. 26 U.S.C. § 4980H. Because the Agency makes Advance Premium Tax Credits determinations that require employee attestations about employer-sponsored insurance, employers are provided the opportunity to appeal those determinations. 45 C.F.R. §§ 155.310(h)(4) and 155.555. It should be emphasized, however, that any liability for the tax payment is determined by the Internal Revenue Service and not by the MNsure agency. 26 U.S.C. § 4980H(d). As a result, this decision addresses only whether the employee was offered Minimum Essential Coverage by the Appellant, and not whether the Appellant was required to offer such coverage.
   b. In many circumstances, the employer has no such obligation. In general, the coverage requirement only applies to employers with a full-time equivalency of 50 or more employees, and only to those employees that average 30 or more hours per week. 26 U.S.C. § 4980H. In addition, in some circumstances an employer plan may be unaffordable to an employee without triggering any liability for the employer, due to affordability “safe harbors”. 26 C.F.R. § 54.4980H–5(e). Again, these determinations are made by the Internal Revenue Service and not the Agency.9

9. **Analysis and Conclusion.**
   a. Here, all parties agree the Employee was offered employer-sponsored coverage. The analysis does not conclude here, however, because an offer of coverage is considered Minimum Essential Coverage only if it both provides minimum value and is affordable to the Employee.
   b. The preponderant evidence supports a conclusion that the plan offered by Appellant was not affordable to the Employee. Even when viewing the facts in the light most favorable to the Appellant, the Employee’s enrollment in Appellant’s lowest-cost plan would have taken up 17.44 percent of his projected household income. Because this exceeds the 9.66 percent affordability limit detailed above, it is considered

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9 The Internal Revenue Service provides an overview titled “Questions and Answers on Employer Shared Responsibility Provisions Under the Affordable Care Act” on its website, at [http://1.usa.gov/1Lb4wmC](http://1.usa.gov/1Lb4wmC).
legally unaffordable to the Employee.

c. Given the conclusion that the plan is not legally affordable to the Employee, it is not necessary to determine whether it provides minimum value, although it is noted that the record provides no indication that it does not. Still, because employer-sponsored coverage must both be affordable and provide minimum value to be a barrier to an employee’s Advance Premium Tax Credits eligibility, it is not necessary to conclude whether the latter element is met.

d. In conclusion, because the plan offered by Appellant is not affordable to the Employee, it is not considered Minimum Essential Coverage and is therefore not a barrier to his receipt of Advance Premium Tax Credits. As such, the Agency’s determination of eligibility for Advance Premium Tax Credits should be affirmed.

e. Notwithstanding the conclusion above, it must be emphasized that this does not mean that Appellant is responsible to the Department of the Treasury for Employer Shared Responsibility payments. First, as explained in Conclusion of Law 8(b) above, it is beyond the scope of this decision to determine whether Appellant is legally considered a large employer or whether the Employee is legally considered a full-time employee. Those questions relate to whether the Employer Shared Responsibility provisions even apply in this case, and are determined solely by the Internal Revenue Service. In addition, as noted above, affordability safe harbors can allow an employer to offer coverage that is deemed by the Internal Revenue Service to be affordable, even it is not technically affordable to a particular employee as the concept relates to his or her eligibility for Advance Premium Tax Credits. However, that too is a determination of the Internal Revenue Service, and does not alter the Employee’s eligibility for Advance Premium Tax Credits.

RECOMMENDED ORDER

THE APPEALS EXAMINER RECOMMENDS THAT:

• The MNsure Board AFFIRM the determination that the Appellant does not provide Minimum Essential Coverage through an employer-sponsored plan to the Employee and, as a result, that the Employee was properly determined eligible for Advance Premium Tax Credits. This decision has no effect on the Employee’s eligibility for Advance Premium Tax Credits.

Ruth Grunke Klein
Appeals Examiner
ORDER

IT IS THEREFORE ORDERED THAT, based upon all the evidence and proceedings, the MNsure Board adopts the Appeals Examiner’s Findings of Fact, Conclusions of Law, and Order as its final decision.

FOR THE MNSURE BOARD:

_________________________________________  Date

cc:  [Redacted], Appellant
     [Redacted], Employee / Interested Party
     MNsure General Counsel
EFFECT OF DECISION AND FURTHER APPEAL RIGHTS

Those who disagree with the decision should consider seeking legal counsel to identify further legal recourse.

APPELLANTS / EMPLOYERS

- **Effect of decision / Appeals under the Internal Revenue Code**

This decision does not determine liability for or immunity from Employer Shared Responsibility payments. While the appeal involves the requirement of certain employers to offer Minimum Essential Coverage to certain employees, Employer Shared Responsibility is determined solely by the Internal Revenue Service, under 26 U.S.C. § 4980H. Also, the appeal decision does not foreclose appeal rights the employer may have under Subtitle F of the Internal Revenue Code, relating to the procedural requirements of the U.S. tax system. 45 C.F.R. § 155.555(k)(1)(ii).

- **Reconsideration of this decision**

In addition to the rights stated above, an Appellant who disagrees with this decision may request reconsideration by the MNsure Board in writing within 30 days of the date of this decision. Minn. R. § 7700.0105, subp. 18a(A). The request must state the reasons you believe your appeal should be reconsidered, and may include legal arguments and proposed additional evidence supporting the request. However, if additional evidence is proposed, you must explain why it was not provided by the deadline imposed by the Appeals Examiner in the course of the appeal. The request must be sent to appeals entity at the address below or faxed to (651) 431-7523.

Minnesota Department of Human Services – Appeals Office
P.O. Box 64941
Saint Paul, MN 55164-0941

- **Judicial review**

Judicial review may be sought to the extent authorized by law. Minn. R. § 7700.0105, subp. 20.

EMPLOYEES

- **Redeterminations of eligibility**

Some decisions may result in a redetermination by the MNsure Board of the Employee’s eligibility for Advance Premium Tax Credits and/or Cost-Sharing Reductions. In those cases, the MNsure Board must take a separate action to redetermine eligibility, under 45 C.F.R. § 155.330. If that occurs, the employee has a separate right to appeal that redetermination, and the employee must be notified of that right if and when any redetermination is made. 45 C.F.R. §§ 155.555(k)(2)(ii) and 155.515; 42 U.S.C. § 18081(f); Minn. Stat. § 62V.05, subd. 6. The rules for MNsure appeals can be found in Minnesota Rules, Parts 7700.0100 – 7700.0105. In addition, more information can be found on the MNsure website at www.mnsure.org/help/appeals.