



# M e m o r a n d u m

To: ETP Panel  
Executive Director

From: Maureen Reilly  
General Counsel

Date: September 22, 2017

File:

Subject: VALUATION OF HEALTH BENEFITS

This memo concerns the valuation of health benefits in meeting the earnings requirement for ETP funding. At issue is how to best reconcile the proviso for “reportable California earnings” with the authority to “consider the value” of health benefits, both of which appear in Unemployment Insurance Code Section 10201(f).

## Governing Law

The earnings requirement principally arises under the definition of “Job” at **Section 10201(f)**. This definition requires employment with career potential and job security with reportable California earnings. As amended in 1994, it authorizes the Panel to consider the value of health benefits in meeting the earnings requirement.<sup>1</sup>

Section 10201(f) is shown in pertinent part below, with emphasis on key terms:

(f) “Job” means employment on a basis customarily considered full time for the occupation and industry. The employment shall have definite career potential and a substantial likelihood of providing long-term job security, with reportable California earnings during the employment retention period. Furthermore, the employment shall provide earnings, upon completion of . . . [retention] . . . equal to 50 percent, in the case of new hire training, or 60 percent, in the case of retraining, of the state or regional average hourly wage. However, in no case shall the employment result in earnings of less than 45 percent . . . for new hire training and 55 percent . . . for retraining. The Panel may consider the dollar value of health benefits that are voluntarily paid for by an employer when computing earnings to meet the minimum wage requirements.

Wages for Special Employment Training (SET) were established under a second legislative amendment took effect in 1994 at **Section 10214.5**.<sup>2</sup> The wage requirement at Section 10214.5(b) is shown in pertinent part below, with emphasis:

(b) Training shall be targeted, but not limited, to frontline workers who earn at least the state average hourly wage.

<sup>1</sup> AB 3461, Stats.1982, eff. 1/1/83 and SB 96, Stats.1993, eff. 1/1/94, respectively.

<sup>2</sup> SB 1327 Stats. 1994, eff. 9/27/94.

*Consistent with basic tenets of statutory construction, it is assumed the Legislature meant to extend the Panel's authority to consider the value of health benefits for SET, which was created in 1994 after the definition of "Job" had been amended in the 1993 session. In other words, if the Legislature meant to exclude health benefits from SET, it could have done so under the second-in-time amendment, but did not.*

The valuation of health benefits is clarified under the definition of Wage Criteria at regulation **Section 4418**, as adopted in 1995 and amended in 2005. It is shown in pertinent part below, with emphasis:

(e) The Panel may include the dollar amount of health benefits paid to a trainee in determining his or her hourly wage. As used herein, 'health benefits' means payments made by the employer toward the cost of medical, dental or vision care insurance. These employer payments may be made as follows: . . . In every instance, these employer payments must be reliable and verifiable before they may be included in the hourly wage determination. (Emphasis added.)

*It is well-accepted that the Panel may interpret its own regulations. Even if the Panel accepted employer representations of valuation in the past, it can interpret "reliable and verifiable" as requiring written documentation or some other control, going forward.*

### **Analysis**

At tension is the statutory requirement that earnings be reportable in California, which is presumed to mean payroll reporting to EDD; and the statutory authority to consider the value of health benefits, which are not included in payroll reporting.

#### **Reportable California Earnings**

The hourly wage or "base wage" is the only component of earnings reportable in California. This is the taxable base, included in payroll reporting to the Employment Development Department (EDD) for purposes of tax withholds such as the Personal Income Tax and the Unemployment Insurance (UI) tax. The base wage includes verifiable commissions, bonuses and tips -- but not health benefits.

*Consistent with basic tenets of statutory construction, it is assumed the Legislature was aware of the fact that health benefits are not included in payroll reporting to EDD when it established the "California reportable earnings" standard at Section 10201(f). The enabling legislation contains many references to EDD, and the ETP program is funded through UI tax withholding.*

#### **Consider the Value**

Because health benefits are not included in payroll reporting, ETP staff has come to rely on employer representations of value, giving rise to possible overestimates and creating uncertainty as to individual vs. family coverage

The employer share-of-cost for health benefits has always varied from one company to another, and is subject to collective bargaining for represented occupations. This cost depends on the extent of coverage elected by the employee (single, plus-one or family), which can change from one open enrollment period to another, all of which creates further uncertainty as to valuation.<sup>3</sup>

These variations and uncertainties persist today, even though most employers are required to pay a threshold share-of-cost under the Affordable Care Act of 2010. In addition, even with a mandate for employer-paid health benefits, the employee is usually expected to share in the premium cost. There is anecdotal evidence to suggest that private sector employees may “opt out” of coverage altogether to avoid this cost. The decision to opt-out varies per-trainee, and is almost impossible to document.

*Consistent with basic tenets of statutory construction, when the Legislature authorized the consideration of health benefits in meeting the earnings requirement, it must be assumed that it intended for the Panel to establish a strict valuation methodology, consistent with the reliability of payroll reporting.*

### **Conclusion**

In order to reconcile the tension between the requirement of “reportable California earnings” with the authority to “consider the value” of health benefits, staff recommends that the Panel adopt a strict position on written documentation, or other control. This would be consistent with the “reliable and verifiable” standard in regulation Section 4418.

The employer share-of-cost for health benefits is documented in writing under a Collective Bargaining Agreement (CBA) or other contract of employment. Absent this degree of reliability, staff recommends putting a reasonable cap on valuation to prevent overestimates and uncertainty.

### **Recommendation**

For the reasons set forth above, staff recommends that the Panel require written documentation for valuation of health benefits, which can be met by a CBA or other contract of employment.

Absent documentation, staff recommends that the Panel impose a reasonable cap on valuation, such as \$2.50 per hour. This cap is based on the staff survey of statewide employer-paid health benefits (share-of-cost) presented to the Panel on May 24, 2017.

Staff further recommends that the requirement for written documentation (and in its absence, the cap on valuation) be made effective in the new Calendar Year, for proposals coming to Panel in January 2018.

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<sup>3</sup> The Post-Retention Wage is subject to modification for a High Unemployment Area per UI Code Section 10201.5 and regulation Section 4429. Modifications also apply to SET for Critical Proposals and Priority Industry, per regulations.