

Employers for Flexibility in Health Care

September 27, 2012

Submitted electronically via Notice.comments@irscounsel.treas.gov and e-ohpsca-er.ebsa@dol.gov.

Attn: CC:PA:LPD:PR (Notices 2012-58,
2012-59)
Room 5203
Internal Revenue Service
P.O. Box 7604
Ben Franklin Station
Washington, DC 20044

Office of Health Plan Standards and
Compliance
Employee Benefits and Security
Administration
Room N-5653
U.S. Department of Labor
200 Constitution Ave., NW
Washington, DC 20210

Request for Comments re:

- I) Determining Full-Time Employees for Purposes of Shared Responsibility for Employers Regarding Health Coverage (IRS Notice 2012-58)
- II) Guidance on 90-Day Waiting Period Limitation Under Public Health Services Act §2708 (Notice 2012-59, issued by the Departments of Labor, Health and Human Services, and the Treasury)

We are writing in response to the above notices on behalf of the Employers for Flexibility in Health Care ("EFHC") Coalition, a group of leading trade associations and businesses in the retail, restaurant, hospitality, construction, temporary staffing, and other service-related industries, as well as HR professionals and employer-sponsored plans insuring millions of American workers. We would like to thank you for issuing guidance that provides much needed flexibility for employers with different kinds of workers, such as part-time, seasonal and temporary, by allowing for a measuring period to determine employee full-time status for employers with variable workforces.

The Coalition is reviewing the guidance and examining some of the technical and administrative issues associated with the safe harbor proposals for determining full-time employee status and application of the 90-day waiting period limitation. We appreciate the development of rules that will allow some employers to continue to offer coverage to their part-time workforce. We also look forward to continuing our discussions regarding how the look-back stability safe harbor method will apply to seasonal workers and employees who work full-time for short durations. We are concerned that limiting the application of the safe harbor will lead to unnecessary coverage "churning" for these populations, which may lead to unstable coverage for employees and inability of employers to offer coverage to short-term workers.

As you work to issue proposed regulations on the Affordable Care Act's employer responsibility provisions under Internal Revenue Code section 4980H, we look forward to working with you to issue additional guidance as soon as possible on the coverage and reporting requirements under the law as well as the assessment of employer tax penalties. Specifically, we would welcome an opportunity to work with you on refining key definitions under the law including the definition of small employer and the definition of the offer of coverage under IRC §4980H(a). The Coalition is also eagerly anticipating further guidance on the coverage requirements under the law, including the proposed affordability safe harbor based on current wages and further clarification on the methodologies for

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calculating the minimum value standard. Finally, a critical aspect to the implementation of the law for employers and employees will be the accurate determination of individual eligibility for premium assistance tax credits and assessment of employer tax penalties. Creating a workable system hinges upon the interactions of employers, state insurance Exchanges, and the federal agencies. We hope to work with you further to develop rules for Exchange determinations of individual eligibility for tax credits, employer reporting requirements, and the verification process by the Internal Revenue Service.

We appreciate that employers can rely on the Administration's current guidance through the end of 2014 with respect to the determination of full-time status, the 90-day limitation on waiting periods (including the corresponding inapplicability of IRC §4980H penalties based on full-time employees during the initial three months of employment), and the affordability safe harbor. However, in the absence of formal, comprehensive and final regulations on all issues under IRC §4980H, employers are not able to fully prepare to implement the employer requirements under the law. Once comprehensive regulations are issued that employers can rely on for planning and budgeting purposes, employers will need at least 18 months to make the changes needed to fully comply with the ACA's employer requirements. A grace period under IRC §4980H(b) may be necessary during this time.

Because employers have completed the budgeting and planning process for health benefits for 2013 and in many cases already have begun the processes for 2014, employers' ability to make changes to their plan design, payroll, and communications systems for 2014 is already limited. For example, members of our coalition are increasingly concerned about the potential for increased tax liabilities for non-calendar year plans that already will be in effect when the law's employer requirements take effect on January 1, 2014. A transition may be necessary for an employer with a plan year that begins on July 1, 2013, who could face tax penalties if the employer does not increase the employer contribution in the middle of the plan year in order to meet the law's affordability standard or make changes to their plan to meet the ACA's minimum value standard.

We thank you for the opportunity to provide comments and look forward to continuing to work with the Administration on the development of workable regulations that maintain employer-sponsored coverage as a competitive option for all employees whether full-time, part-time, temporary, or seasonal workers.

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For questions related to this letter, please contact Christine Pollack, Vice President, Government Affairs, Retail Industry Leaders Association, at 703-600-2021, or Anne Phelps, Principal, Washington Council Ernst & Young, Ernst & Young LLP, at 202-467-8416. Respectfully submitted by the Employers for Flexibility in Health Care Coalition and the following signatories,

Aetna
Allegis Group
American Hotel and Lodging Association
American Staffing Association
Associated Builders and Contractors, Inc.
Associated General Contractors of America
College and University Professional Association for Human Resources
DineEquity, Inc.
Food Marketing Institute
HR Policy Association
International Association of Amusement Parks and Attractions
International Franchise Association
International Public Management Association for HR
J.C. Penney
Jo-Ann Fabric & Craft Stores
Kelly Services, Inc.
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Michaels Stores
National Association of Convenience Stores
National Association of Health Underwriters
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National Retail Federation
Pep Boys
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