

American Federation of Labor and Congress of Industrial Organizations



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*Submitted via e-mail to
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Office of Health Plan Standards
and Compliance Assistance
Employee Benefits Security Administration
Room N-5653
U.S. Department of Labor
200 Constitution Avenue, NW
Washington, DC 20210

Re: Technical Release 2012-01—Frequently-Asked-Questions from Employers
Regarding Automatic Enrollment, Employer Shared Responsibility, and
Waiting Periods

Ladies and Gentlemen:

This response to Technical Release 2012-01 ("Release") issued by the Department of Labor ("Department") is submitted on behalf of the American Federation of Labor and Congress of Industrial Organizations ("AFL-CIO") and its 57 affiliated unions. The AFL-CIO, together with its community affiliate Working America, represents more than 12 million workers across the country. Collectively, our affiliated unions negotiate health care benefits for almost 40 million workers, retirees, and their family members, and these benefits are provided through single employer and multiemployer plans, both insured and self-funded.

The Release includes questions and answers ("FAQs") related to the implementation of the employer responsibility requirements in Internal Revenue Code Section 4980H ("Section 4980H"), one of the central provisions of the Affordable Care Act. This statutory requirement provides employers with an incentive to offer affordable health care coverage to their employees, and in keeping with the goal of the Act to expand the availability of coverage, the Department, together with the Departments of Health and Human Services and Treasury, should exercise its

regulatory authority so that more employees are considered to be full-time employees, as intended by Congress.

We are concerned that the approach described in FAQ-5 for determining whether a newly-hired employee is a full-time employee will limit the number of workers considered to be full-time employees as well as invite manipulation by employers in order to avoid assessment of any penalty under Section 4980H.

In FAQ-5, the full-time status of a newly-hired employee depends, in part, on whether the individual "... is reasonably expected as of the time of hire to work an average of 30 or more hours per week on an annual basis" This approach, like that in Notice 2011-36 with respect to determining hours of service, appears to be based on a traditional workplace, one where employees work an eight-hour day on a routine basis. As we noted in our comments on Notice 2011-36, this construct does not reflect the variety of workplaces and schedules that exist across the country and in different sectors. In some sectors, such as air transportation, work hours are limited by law. The traditional schedule in education includes holidays and an extended summer break which could lead to employees failing to satisfy a weekly average hours of work requirement calculated on an annual basis.

We urge Treasury and the IRS, as we did in our response to Notice 2011-36, to take into account the wide variety of workplaces and their different schedules so that any approach to determining the full-time status of employees addresses the differences among workplaces.

As described in FAQ-5, in certain circumstances, an employer may have an additional three-month period to determine whether a newly-hired employee is considered to be a full-time employee. This extended period would be available if the employer cannot reasonably determine whether the new employee is expected to be full-time at the time of hiring and the individual works full-time during the first three months, but those hours are not viewed as representative of the employee's expected average hours on an annual basis. In our view, employers generally know the expected status of employees when they are hired, so the proposed approach appears to address a problem that is not typical. In addition, the proposal invites employers who control work schedules to consider that the hours worked during the initial three-month period are not representative and to reduce the hours in the second period in order to avoid the penalty as well as the offer of health care coverage. We suggest that the approach be modified to eliminate the additional three-month period in order to minimize the potential for employer manipulation and to limit the harm to employees resulting from the employer's failure to offer coverage.

We appreciate the opportunity to provide comments in response to Technical Release 2012-01, and we urge the Department to incorporate our suggestions in any proposed rule or other guidance that is issued.

Sincerely,



Karin S. Feldman
Benefits and Social Insurance Policy Specialist