

April 9, 2012

**VIA REGISTERED E-MAIL**

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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, D.C. 20210

Re: Comments on Technical Release 2012-01

To Whom It May Concern:

The Equity-League Health Fund (the “Fund”) submits these comments to Department of Labor (“Department”) Technical Release 2012-01 (the “Technical Release” or “Release”), which addresses certain issues related to the implementation of the Patient Protection and Affordable Care Act (the “Affordable Care Act” or “ACA”). Any reference to the Release is also intended to refer to the Internal Revenue Service’s Notice 2012-17, as both forms of guidance are substantially identical in form. We also note that the Fund is a signatory to another comment letter that was presented by the firm of Bush Gottlieb on behalf of multiemployer health plans in the entertainment industry (collectively, the “Plans”).<sup>1</sup>

The Fund is a multiemployer plan, established and maintained pursuant to collective bargaining agreements and operated through a stand-alone trust managed by a joint and equal number of labor and management representatives comprising its Board of Trustees (“Trustees”). Established in 1961, the Fund has provided comprehensive and affordable health care coverage for

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<sup>1</sup> The Plans that are also submitting these comments on a collective and/or individual basis are the AFTRA Health Fund, the Directors Guild of America – Producer Health Plan, the IATSE National Health and Welfare Fund, the Motion Picture Industry Health Plans, the Screen Actors Guild – Producers Health Plan, and the Writers’ Guild – Industry Health Fund.

over five (5) decades, and currently has approximately 10,000 eligible employee participants (not counting dependents). The workers covered by the Fund are largely actors and stage managers employed in legitimate theater productions throughout the country. In a given year, pursuant to some 50 collective bargaining agreements, approximately 1,800 employers, ranging from Disney in Orlando, to the Venetian Hotel in Las Vegas, to the Seattle Children's Theatre, to the Chicago Shakespeare Theatre, to the Shubert Theaters on Broadway in New York City, contribute in accordance with their respective agreements, an average of approximately \$170 per week for each employee working in a given week.

With that introduction, we note that the Fund as well as some of the other Plans previously submitted comments on June 17, 2011, in response to Notice 2011-36. There, we noted the importance of utilizing a measurement period/stability period safe harbor as a method to determine whether an employee should be considered "full-time" under §4980H and we explained in those comments why such an approach is necessary for these Plans. For your convenience, we have attached the June 17<sup>th</sup> Comments, along with the related comment letter of September 17, 2010.<sup>2</sup> We continue to support the approach outlined in the June 17<sup>th</sup> Comments, and encourage the regulatory agencies to formalize this approach in the proposed regulations, as was suggested in the Technical Release.

## **I. Overview of the Fund's Comments to the Technical Release**

Generally speaking, our comments address some additional suggestions regarding the coordination of the employer shared responsibility provisions under Code section 4980H and the 90-day waiting period limitation under PHS Act section 2708. These suggestions are necessary in order to clarify operation of the new rules and to permit successful implementation in the unique context of the entertainment industry. Specifically, for the reasons explained below, we urge that future guidance provide that:

- The Code Section 4980H "free rider" penalty not apply to contributing employers who make collectively bargained contributions to a multiemployer health plan with regard to their collectively bargained employees, and that such employees not be considered in determining whether the employer is subject to such penalty by virtue of its non-bargained employees, if any. At a minimum, in the event that this "special" exemption is unlikely to be adopted by the Department, the free-rider penalty should not apply to any collectively bargained employee (newly hired or

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<sup>2</sup> Those June 17 Comments also referred to, and relied upon, correspondence dated September 17, 2010 correspondence which was submitted on behalf of six of these Plans. As both the June 17 Comments and the September 17 correspondence will reflect, all of these Plans share common eligibility structures that are discussed in these Comments. Together the June 17 Comments and the September 17 correspondence are referred to in these comments as the "June 17 Comments."

otherwise) during the period in which the employee has not satisfied the multiemployer plan's eligibility requirement or 90-day waiting period. In addition, if full-time employment is a criterion for determining whether the free-rider applies with regard to collectively bargained employees, the Department should also adopt an alternative definition of full-time employment. For example, when hours cannot be tracked by the plan, an earnings equivalent or a metric based on work weeks within a period of no less than 12 months should be used to determine full-time employment in order to address the employment dynamics and difficulty in the entertainment industry of determining the hours worked by a covered employee.

- In determining whether a multiemployer plan's eligibility rule (as determined by the trustees and not by the contributing employers to such plan) based on a specified cumulative number of hours or weeks of service (or earnings) over a 12-month period will not be treated as being designed to avoid compliance with the 90-day waiting period limitation, guidance should provide that it will be appropriate to take into account the length of time that benefits will be provided after the employee becomes eligible and that it is permissible to allow the eligibility period to extend up to 12 months.
- In determining whether an eligibility rule based on hours, work weeks, earnings, or contributions earned over a 12-month (or less) eligibility period is designed to avoid compliance with the 90-day waiting period, guidance should provide that it will be appropriate to commence the start of the 90-day waiting period at the end of such eligibility period.
- Guidance should clarify that 90 calendar days is equivalent to three calendar months.

## II. General Background - Nature of the Entertainment Industry and Eligibility Structure of the Plans

As we explained in our June 17th Comments, these Plans have developed eligibility and benefit provisions that permit them to provide comprehensive and affordable benefits to employees in an industry with the following unique characteristics:

- Participants in these plans are primarily employed on a freelance basis.
- Participants commonly work for many different employers for short period of time and often have several short-term employment contracts within a given year.
- It is not unusual for a participant in the Plans to be unemployed for long periods of time and, when they are employed, it is common for them to be employed on less than a full-time basis.

Although all of the Plans have distinguishing characteristics, they generally share key features that will be uniquely impacted by the issues discussed in the Technical Release.<sup>3</sup> These include:

- Employees establish eligibility for health coverage in most cases over a period of three to twelve months based on hours or weeks worked, employer contributions, or earnings on which contributions are based (depending on the Plan).
- Once an employee satisfies the hours or weeks worked or earnings requirement, the participant is eligible for continuous health benefits beginning one calendar quarter after the end of the quarterly period during which the participant established eligibility for benefits.
- A participant will then continue to receive benefits for up to one year (depending on the coverage terms of the Plan) – regardless of whether the participant is employed at all by employers contributing to the plan during that extended period of time.

Thus, employees will establish eligibility to commence benefits in the calendar quarter after the end of the quarterly period during which the participant first established eligibility for benefits. Once benefits commence, employees will continue receiving them for a very generous period of time even if they stop working (again, in recognition of the project-oriented nature of the industry). As a result, collectively bargained employees who work in the entertainment industry can maintain continuous health coverage under their respective Plans even if they frequently change jobs. Without this unique plan structure in place, many of these employees might not have access to affordable and comprehensive health coverage for themselves and their families.

In view of this long-established eligibility structure, we have two basic concerns regarding the Technical Release. First, Code Section 4980H, as proposed, could potentially subject a number of contributing employers to entertainment industry multiemployer plans to penalties, despite the fact that the coverage provided under the Plans is far more generous than the health care reform rules would require. For this reason, we respectfully request that the Department create a specific exemption for contributing employers from the free-rider penalty with regard to collectively bargained employees for whom the employer makes contributions to a multiemployer plan regardless of whether the benefits are provided on an insured, self insured, or combined basis. This means that such employees would not be (i) counted in determining whether the employer is large enough to be subject to the free-rider penalty; or (ii) taken into account in determining how much is owed by the employer, of the penalty were to apply with regard to their non-bargained employees. Alternatively, if the inclination is not to adopt this special exemption, we would respectfully recommend that the free-rider penalty not apply within the 90-day waiting period or during the

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<sup>3</sup> The Plans' benefits and eligibility structures are described in detail in our previous correspondence and Comments.

eligibility period designated under the plan. Second, while the Technical Release proposes some flexibility under PHS Section 2708, there are some clarifications needed to make sure that it operates in the intended fashion.

### **III. Eligibility Rules for Workers Covered by the Fund**

Employees, who meet the Fund's eligibility requirements, contribute only a very modest amount (\$100 per calendar quarter) for their health coverage (approximately 5% of the actual cost). Eligibility is based on weeks of employment accumulated across a period of up to 12 months with a quarterly "look back" at an employee's employment. As such, eligibility may be established as soon as one quarter or as long as one year. Then, there is a three-month enrollment process during which coverage options are communicated to participants, employee contributions are collected and elections are processed. As a result, under the Fund, the commencement of health coverage generally occurs after the employee's employment start date, but is ultimately extended by the implementation of corresponding tail coverage after employment ends to account for and offset the delay attributed to the participant's waiting period for such coverage. Thereafter, employees who lose coverage under the Fund are offered COBRA continuation benefits. In addition, under the Fund, certain eligible participants may have the option of continuing their health coverage after their COBRA coverage ends for the balance of their lifetime, provided that they satisfy certain additional eligibility requirements for such coverage and continue to timely pay the required premium (which is the equivalent of the current COBRA premium for such coverage) to the Fund.

In considering the Fund's eligibility rules, it is also important to understand that our covered employees (i.e., Actors and Stage Managers) generally have very different work patterns than typical employees. They may be devoted on a full-time basis to a long-running live show, yet not have sufficient official work hours to be considered a "full-time" employee under ACA. They may work several weeks or months on a production and before accepting employment on a different production that may be located in another city or may travel throughout North America. Upon the closing of a production, Actors and Stage Managers often look for work (that is, audition) on a daily basis before finding new employment. As noted above, they often continue to receive uninterrupted health benefits during much of this time.

As a result, the specially designed coverage rules of this Fund, wherein employees may be credited for a full week of employment (toward the 12 weeks necessary to obtain 6 months of coverage) when they may work a single performance, allows for more employees to qualify for coverage than would be possible under the minimum requirements of ACA. Therefore, regulations that enable multiemployer plans (like the Fund) to structure their coverage rules to recognize the unique work patterns in a particular industry are more likely to enable these plans to maximize the number of employees covered through employment and possibly in excess of what would have otherwise been accomplished under ACA's minimum requirement compliance mandates.

#### **IV. Employer Shared Responsibility for Employees Other than New Hires Under Code Section 4980H**

With regard to most freelance employees, the Technical Release outlines an approach that would appear to permit these Plans to continue to provide benefits in accordance with their current eligibility structure. Specifically, Q&A 4 indicates that employers may use a “look-back/stability period safe harbor” to determine full-time status for employees other than new-hires. This Fund utilizes a 12 month lookback period for purposes of eligibility and grants coverage for 12 months for those participants who work at least 20 weeks during the 12 month look back period (and 6 months of coverage for those who work at least 12 weeks during this lookback period). As such, it would make sense to have a lookback/stability safe harbor period that has up to 12 months, to accommodate the unique plan design features of this Fund. Thus, the employer would have up to a twelve-month period to determine whether that employee is actually working full-time. Based on the eligibility and benefit structure of these Plans, any freelance employee who would be considered “full-time” utilizing a 12-month safe harbor method will qualify for benefits from these Plans and an employer would therefore not be subject to section 4980H penalties.

The Plans will also be able to continue to provide benefits utilizing their current eligibility and earnings structure with regard to newly-hired employees who are not expected to work “full-time” and who do not do so. With regard to newly-hired employees, Q&A 5 states that an employer will not be subject to section 4980H penalties for the first three months following date of hire if the employee is both not expected to work “full-time” during the first three months of employment and does not do so. With regard to a freelance employee or any other employee who is not “reasonably expected” to work full-time for the first three months of employment, and who does not do so, an employer would therefore not be subject to the section 4980H penalties.

#### **V. Employer Shared Responsibility for New Hires Under Code Section 4980H**

Q&A 5 indicates that employers will be required to provide coverage for new hires within three or six months, depending on (1) the facts and circumstances at the time of hire and (2) hours worked during the first three- (or six-) month period. This approach would be detrimental to collectively bargained participants within the entertainment industry and would impose a costly administrative burden on the Plans – particularly at a time when they can’t afford it and are struggling to maintain benefits in the face of tepid growth in the economy, historically low investment returns, and rising medical inflation headwinds. In addition, it would result in the kind of disruption that the “look back/stability eligibility period safe harbor” is intended to avoid.

To begin with, as noted above and in our June 17th Comments, a “full-time” employee in the Plans who begins receiving benefits within six months after initial employment will continue to receive benefits for many months after that employee is employed on a full-time basis by that employer. Indeed, for many employees who qualify for benefits, their coverage will extend for more

than a year after any employment for any employer making contributions to these Plans. In other words, while the beginning of coverage may be delayed on the front end, it is extended for much more time on the back end. As a further beneficial result, individuals who are faced with intermittent and unpredictable employment with many different employers know that they will receive benefits for an extended period of time and will have advanced knowledge of when they might lose that coverage so that they can obtain other coverage.

While the current system therefore does not disadvantage any newly-hired employee, the proposed new-hire full-time status measurement process would disadvantage employees in the entertainment industry. This is because if plans revise their eligibility structure to provide benefits more quickly to permit contributing employers to avoid section 4980H penalties, those plans simply could not afford to provide such benefits on the back end. As a result the plans might cease providing those benefits to these “full-time” employees once they lose “full-time” status. This would lead to the incongruous result of longer periods of coverage for employees who are *not* full-time and shorter periods for employees who the statute is presumably intended to benefit – employees who *are* working full time.

While the Plans could attempt to shift the eligibility period forward and provide benefits to “full-time” employees within three months of their date of hire and extend that coverage for six or twelve months, such an approach is not economically or practically feasible. Since three months of employment does not lead to eligibility under most of these Plans, the Plans would have to reconstruct their entire eligibility system to accommodate the accelerated eligibility and the possibility that the Plan would never receive contributions sufficient to cover the cost of extended coverage for the relevant eligibility period.

In addition, the requirement to provide benefits more quickly to certain newly hired employees would also lead to an enormous administrative burden on these Plans and the employers that contribute to these Plans. Employers themselves have limited or no involvement in the day-to-day operation of the Plans. The Plans are Taft-Hartley funds, sponsored by a joint board of trustees made up of both employer and union representatives. There is no system in place for contributing employers to gauge and provide information to the Plans regarding whether they “think” a newly hired employee will be working full-time. While this sort of facts-and-circumstances analysis might work for most traditional employers in a single-employer setting, it presents nearly impossible compliance hurdles in the multiemployer context in the entertainment industry (as discussed in greater detail below). Add to this the disconnect between the employer and the Plans, and the problems are not only disruptive of longstanding eligibility rules, but become simply insurmountable.

Finally, in an industry characterized by frequent short stints of employment with numerous employers by employees who are frequently not working on any kind of hourly basis, it becomes impossible to apply the two concepts that are central to the approach suggested by the Technical Release: the concept of a “newly hired” employee and the concept of “full-time” employee.

### *“Newly hired” employees*

It would be very difficult to determine on any kind of consistent and predictable basis who should be considered a “newly-hired” employee in this industry. In this regard, the Technical Release creates more questions than it answers, including:

- How can an entertainment industry employer gauge whether an employee is expected to be full-time at the time of hire, considering the project-oriented nature of the industry?
- Is an employee who worked for that same employer as a freelance employee in the past considered “newly-hired” employee when hired on a “full-time” basis?
- What if that freelance employment was within weeks, or even days, of the day that that employee is hired as a “full-time” employee?
- What if an employee worked “full-time” for the employer on one motion picture, and then begins working for that employer on a “full-time” basis on another motion picture several years later?

Thus, requiring employers to make a distinction based on which employees are “newly hired” will lead to unnecessary confusion and complication for all involved. Furthermore, if the term is not specifically defined by regulatory guidance, then thousands of individual employers will be defining the term for themselves and for the several different multiemployer plans that they might be making contributions to on behalf of employees covered by different collective bargaining agreements. Given the impact that this determination might have on eligibility, this uncertainty would be extremely problematic for the Plans, the employers and plan participants.

### *“Full time” employees*

It is also very difficult to determine who is “full-time” in an industry where many employees work under contracts and where hours worked are not tracked by the employers or reported to the Plans. Although future guidance may provide some assistance in determining when a salaried employee should be considered “full-time,” the unique nature of employment in this industry will inevitably lead to many areas of ambiguity. It is impracticable to require many thousands of different employers to interpret that guidance to the unique employment situations in this industry, and it is placing the Plans in the untenable position of relying on those individual employer interpretations in determining eligibility for benefits.

## **VI. Proposed Approach to Application of Code Section 4980H**

As we discussed above and in our June 17 Comments, to attempt to adopt a rule to determine full-time employment as it relates to multiemployer plans (particularly in the entertainment industry) would be virtually impossible and at the very least extraordinarily complex – primarily because of the employers’ lack of critical information relevant to the operation of the free-rider penalty, plus



their lack of control over the plan design decisions. Also, the Plans are usually unaware (and the employer will not track) the hours worked by an employee. Recognizing that these complexities are unique to multiemployer plans, the Department should exempt contributing employers from the free-rider penalty with regard to collectively bargained employees for whom the employer makes contributions to a multiemployer plan regardless of whether the benefits are provided on an insured, self insured, or combined basis. This means that such employees would not be (i) counted in determining whether the employer is large enough to be subject to the free-rider penalty; and (ii) taken into account in determining how much is owed by the employer, of the penalty were to apply with regard to their non-bargained employees. Alternatively, if the inclination is not to adopt this special exemption, we would respectfully recommend that the free-rider penalty not apply within the 90-day waiting period or during the eligibility period designated under the plan.

Either of these approaches would be workable because they absolve employers from any requirement to assess circumstances at the time of hire, track hours, and provide such information to the Plans, and permit these Plans to continue to provide extended benefits to both “full time” and other employees in this industry.

Finally, we note that Notice 2011-36 stated that “[i]t is contemplated that the proposed regulations would make it clear that an employer offering coverage to all, or substantially all, of its full-time employees would not be subject to the §4980H(a) assessable payment provisions.” (Notice, page 18.) As discussed above, these Plans have established eligibility structures that will ordinarily result in all “full-time” employees qualifying for benefits – so long as the contributing employers have at least twelve months to make the determination of “full-time” status. As a result, the regulations should provide that those contributing employers will be deemed to have met the employer shared responsibility and should not be required to provide accelerated benefits to a small group of Plan participants, particularly since those participants would be treated more favorably as a result.

## **VII. 90-Day Waiting Period Under PHS Act Section 2708**

Q&A 7 indicates the 90-day waiting period may begin after an employee satisfies conditions for eligibility under the terms of a plan “unless the condition is designed to avoid compliance with the 90-day waiting period limitation.” It further provides that an eligibility condition based on a specified cumulative number of hours of service will not be treated as being designed to avoid compliance with the 90-day waiting period limitation “so long as the required cumulative hours of service do not exceed a number of hours to be specified in [the regulations].”

In determining the permitted hours threshold, we ask that the regulatory agencies take into account the length of time that benefits will be provided after the employee become eligible. In other words, the Plans’ should be afforded a longer initial eligibility hours threshold to account for the fact that they provide extended benefits periods beyond the time when the Plans would otherwise be required to provide coverage.

In addition, the guidance should take into account the fact that some of these Plans do not use hours of service as a condition for eligibility, but instead may use other measurements such as contributions to the Plans, weeks worked or earnings on which contributions are based. In determining whether a weeks worked, earnings or contribution based requirement is designed to avoid compliance with the 90-day waiting period, the guidance should take into account not only the length of eligibility that is earned, but also the amount that employees earn under the applicable collective bargaining agreement and the contribution rates to the plans.

Finally, we ask that the Regulations clarify that 90 calendar days is equivalent to three calendar months. This is necessary because a plan that provides benefits "90-days" after an employee becomes eligible for coverage actually will normally begin coverage at the beginning of a calendar quarter. Since there are often a few more than 90 days in a calendar quarter, a plan could be required to begin coverage before the beginning of a month. Since the Plans' administrative process, including computer software systems, are already set up on a quarterly waiting period basis, it would be extremely difficult and costly to implement a system that tracks the 90 days exactly, would be confusing for participants, and would provide no material benefits to participants.

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We appreciate the opportunity to submit comments on these important issues. Please do not hesitate to contact me at (212) 293-4430 if you have any questions about our comments or need additional information.

Respectfully submitted,



Arthur Drechsler,  
Executive Director of the  
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