

NATIONAL  
SKI AREAS  
ASSOCIATION



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Assistance  
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**Re: Ski Industry Comments on IRS/DOL/HHS Notice 2012-17**

Dear Staff:

The National Ski Areas Association (NSAA) submits these comments on **Notice 2012-17** relating to the provisions of the Affordable Care Act (ACA) governing automatic enrollment, employer shared responsibility, and the 90-day limitation on waiting periods. NSAA is the trade association for ski area owners and operators nationwide. It represents 335 alpine resorts, accounting for over 90% of the skier/snowboarder visits in the United States.

NSAA appreciates the opportunity to provide our insights and comments to the three agencies' request for comments on these important aspects of the ACA. In terms of employers and businesses, the ski resort industry in the United States is quite unique in its business models and seasonality of operations. While there are a few high-profile and well known ski resorts, the overwhelming majority of ski areas in the U.S. are small businesses, typically family-owned and operated businesses. As compared to more traditional businesses in the country, ski areas are highly seasonal operations, with significantly large numbers of employees working during the winter months, when ski resorts are open, whereas a tiny fraction of the overall number of employees at ski areas are employed year-round. The overwhelming number of employees hired at ski areas typically work beginning in November or December, and work into March and April.

Furthermore, many employees who work at ski areas go on to other jobs and employers in the spring, following the close of the ski season in March or April, and work jobs in non-ski area businesses (construction, summer outdoor recreation, forestry, campgrounds, hospitality, etc). As a result, many employees who work at ski areas in the winter likely will have different wages (and W-2s), multiple employers at the same time as many work several jobs, and opportunities for health care through a variety of other employers through the course of a year, complicating how to treat such seasonal employees and employers.

Given the unique nature of ski resort operations as compared to more traditional business operations, the regulations regarding an employer's obligation to offer health care coverage to full-time employees starting in 2014 have significant ramifications for ski area owners and operators. NSAA appreciates the opportunity to provide our industry's insights and perspectives on how application of the employer mandate provisions of the Affordable Care Act will dramatically impact ski areas across the country.

### **Automatic Enrollment Requirements**

The Affordable Care Act directs an employer to which the FLSA applies, and that has more than 200 full-time employees, to automatically enroll new full-time employees in one of the employer's health benefits plans and to continue the enrollment of current employees in a health benefits plan offered through the employer. According to the Notice, it remains the Department of Labor's view that, until final regulations under FLSA section 18A are issued and become applicable, employers are not required to comply with FLSA section 18A. NSAA agrees wholeheartedly with this approach. Until such time as regulations are issued by the Secretary of Labor, employers should not have to meet these automatic enrollment requirements. Employers need time to adapt to regulations and make changes to the administration of their plans accordingly. NSAA shares the concerns of other employers about having adequate time to comply with the regulations that are ultimately issued and appreciates the agencies' understanding of this need for sufficient lead time for employers.

Furthermore, because of the myriad new rules and regulations likely to kick in around the January 1, 2014 insurance timeline, providing employers with rolling flexibility is wise, as they become accustomed to these significant changes, and provides maximum flexibility to employers. This is especially important to ski areas, where their benefits plans typically straddle two calendar years, due to the fact that most ski areas hire employees in the autumn of a calendar year through the spring of the following calendar year.

Lastly, the automatic enrollment requirements should have some flexibility that clearly states that an employer's obligation for automatic enrollment does not kick in until the waiting period and safe harbor/look back periods (or six months in total) have elapsed and the employee is fully eligible.

## **General Comments on the 90-day Enrollment Period**

Second, the ski industry proposes that in light of our seasonal nature of our employment, the 90-day waiting period be explicitly allowed to be used for *returning* employees who leave employment at a ski area in March or April, and then go on to other jobs in the rural communities where ski areas are located (e.g., working for the forest service, rafting companies, construction firms, summer camps, and so on). This is a clear break in the employer-employee relationship, a clear termination of the at-will employment relationship with the ski area employer.

For years, the practice in the ski industry is to require employees who return for their second, third, or fourth seasons, to have to go through a “waiting period” for insurance and benefits eligibility. Therefore, if a ski patroller or ski instructor returns to a ski area in November after a previous ski season of employment, after six or seven months of being employed elsewhere, those employees nonetheless have to go through the same waiting periods as newly hired employees. Given years of ski industry practice, this interpretation of the 90-day waiting period is recommended for IRS and other agencies to adopt. More specifically, if there is a bona fide break in employment, for example, of more than 60 days, due to the seasonal nature of employment, than seasonal employers should be allowed to continue to utilize the 90-day waiting period, even for returning employees who had previously worked for the employer. In the ski industry, the vast majority of ski area employees spend their non-winter months working for non-ski industry employers (construction, lodging, campgrounds, outdoor recreational providers, etc).

To limit the impact of this interpretation, it should be allowed only for seasonal employers, and not cyclical employers who may lay off employees due to the ups and downs of the business cycle (seasonal ski areas, for example, tell employees that their jobs will likely be terminated at the end of the ski season in March or April). Again, this has been the practice of the ski resort industry for years.

Similarly, in other jurisdictions that have adopted waiting periods for mandatory employer-provided health coverage (Massachusetts, Hawaii, and San Francisco, for example), these jurisdictions have interpreted similar regulations as allowing employers who terminate seasonal workers to have those returning workers go through a waiting period upon their rehiring the following season.

Indeed, as seasonal employees cross among and between multiple employers over the course of a year, the complications from going in and out of various health plan systems from other employers overwhelms the capacity of human resource departments of seasonal employers like ski areas to sort out the compliance requirements for employees who may be hired for only short periods of time.

Similarly, at the start of each ski season, ski areas go through extensive training and orientations on new policies, protocols, procedures, risk management, and hospitality

practices, costing ski areas millions of dollars in labor and staff training. If returning seasonal employees were allowed to return without a 90-day waiting period – perhaps for one-month simply to cover a returning employee’s existing health-insurance need, for example – returning employees would not be encouraged to stay through the full length of the ski season, so that ski areas could recoup their training costs and ensure for a full-season employment from their seasonal employees. In many instances, employees accept jobs at ski areas, work through Thanksgiving, Christmas, and January holidays, only to quit early and move on to other employment, leaving the ski area short-handed for the heavy holiday weekends in February and the Easter and Spring Break periods in March.

In addition, when ski areas lose employees mid-season – because they don’t have incentives like the prospect of health insurance and other benefits – the ski areas then have to seek out additional replacement employees, and expend *additional* training and orientation costs, for inexperienced employees to round out the remainder of the ski season. By definition, such waiting periods enable employers to ensure committed, reliable employees for the entire season. To date, this has been the basis for requiring waiting periods for health insurance in the ski industry.

For the seasonal ski industry, there is a long break in the employment at-will relationship over the summer months. Returning ski employees at ski areas do not automatically accrue seniority by returning in November or December after being laid off for six or seven months following the end of the ski season in March or April. Seniority is often limited to year-round employees at ski areas. The 90-day waiting period is critical for ski areas, and in light of the highly seasonal nature of our industry, ski areas should have the option of requiring the 90-day waiting period for returning workers who have not been employed by the ski area for more than, say, 60 days. It is critical, and long-standing practice in the industry, to reiterate that returning ski area employees coming back after six or seven months of having been employed elsewhere, have had a definitive break in employment from the ski area employer, including the health insurance coverage aspect of employment.

Therefore, given industry practice and logic, it should be made explicit that for workers who have had their employment terminated due to the seasonal (and not cyclical) nature of their employment, can be subject to the 90-day waiting period when they are re-hired by employers such as ski areas during the next season of employment.

### **Employer Shared Responsibility**

The employer shared responsibility provisions, contained in section 4980H of the Internal Revenue Code, provide that an applicable large employer could be subject to an assessable payment if any full-time employee is certified to receive an applicable premium tax credit or cost-sharing reduction payment. In interpreting this provision, NSAA supports the adoption of a “look back” stability period safe harbor” method for employers to determine if current employees constitute full time employees for purposes

of the employer shared responsibility requirements. For existing employees, a look back period of twelve months would be suitable.

For new employees, NSAA supports the issuance of clear guidance that for at least the first three months following an employee's date of hire, an employer that sponsors a group health plan will not, by reason of failing to offer coverage to the employee under its plan during that three-month period, be subject to the employer responsibility payment under Code section 4980H. NSAA also strongly supports the approach identified in the Notice of providing up to *6 months* for the employer to determine if an employee is full time in the case of newly-hired employees who work seasonally full time and whose first 3 months may not be reflective of the average hours that employee is expected to work on an annual basis (to the extent an "annualized" basis exists within the seasonal nature of the ski industry).

The additional 3-month period for making this determination is crucial to seasonal businesses like ski areas, where employee hours can fluctuate greatly from one portion of the year to the next; as the ski industry experienced during this challenging winter, our industry's ability to offer hours to employees is *highly* dependent on both weather (i.e., adequate snowfall or temperatures for the ability to conduct snowmaking) and for destination resorts, the economics and costs of travel, lodging, and gasoline. NSAA strongly supports the approach discussed in the Notice of not subjecting an employer to a potential section 4980H payment for a six-month period under these circumstances, enabling employers like ski areas to better budget and anticipate their future health care obligations for the upcoming season.

Moreover, for the reasons stated above, the forthcoming guidance should specify that the first and second 3-month look back periods are available to seasonal employers in assessing the full time status of *returning* workers as well. In the ski industry there is typically a long break in the employment at-will relationship over the shoulder seasons and summer and fall months. It is a critical and long-standing practice in the industry that employees who have been employed elsewhere for six or seven months are viewed as a new hire with respect to benefits following a definitive break in employment from the ski area employer.

### **Using an Employee's W-2 Wages as a Safe Harbor**

NSAA also supports the issuance of regulations or other guidance permitting employers to use an employee's Form W-2 wages, instead of household income, in determining whether coverage offered by the employer is affordable. We support the approach outlined in Q&A #2. Particularly for seasonal employers like ski areas, the sheer complexity of trying to gauge *annual* income of seasonal employees, the vast majority whom work for multiple employers over the course of a calendar year, would be a HR manager's nightmare. The use of the ski area employee's W-2 wages provides a slight degree of simplicity and reliability, without the invasion of privacy and bureaucratic red tape of trying to corral total wages and various W-2s among different seasonal or part-time employers to assess overall income and, in turn, affordability. At the same time, it

minimizes any invasion into the employee's private household finances. It should be made clear, though, that the W-2 wages of a seasonal employee – if annualized over the entire year – should be an acceptable tool by which employers like ski areas can look to for gauging affordability.

### **Coordination of Shared Responsibility Provisions and the 90-day Waiting Period Limitation**

NSAA supports the issuance of Treasury/IRS regulations or guidance on how the employer shared responsibility provisions under Code section 4980H and the 90-day waiting period limitation under PHS Act section 2708 should be coordinated. Such information would be helpful to employers as simplicity is much appreciated in this complex set of requirements and safe harbor is something greatly valued by employers. Again, given the unique seasonal nature of the ski industry – and other truly seasonal, non-cyclical employers – allowing employers to “look back” to the previous year to better anticipate the number and extent of full time employees based on the previous season, allowing ski areas to plan and budget for the upcoming season's health care expenses based on full time employees.

Again, explicit clarity should be provided that employers may use the 90-day waiting period for *returning* employees who have had a clear termination by the employer from the previous season (*not* cyclical lay off due to the vagaries of the business cycle).

The unintended consequences of this interplay could be very problematic for seasonal employers like ski areas. Because many ski areas hire employees for periods of 120 to 150 days, roughly speaking, the automatic enrollment requirements may kick in right when an employee only has about one month of employment left during the ski season. Regulators should bear in the mind the disproportionate compliance and bureaucratic headaches involved for seasonal employers who may only have many full time employees eligible for employer-provided health care for a matter of weeks, and allow for some flexibility within this compliance process.

### **Guidance under Code Section 4980H for Determining whether Newly-Hired Employees should be Full-Time Employees**

NSAA strongly supports additional guidance from Treasury and IRS on how regulations will further define the 12-month look back period for determining whether a newly-hired employee is a full-time employer for purposes of the employer responsibility payment provisions under Section 4980H. NSAA strongly encourages Treasury and the IRS to allow for a broad interpretation where employers like ski areas can have six months to make sure determinations.

As noted in Q5 of the IRS's notice, NSAA agrees with such guidance should include room that such determinations will have some built-in flexibility, as noted in this Notice, “based on the facts and circumstances” of the situation. For ski areas, this is critical, because there can be significant fluctuation in employee-needs, given how weather-

dependent the ski industry can. Indeed, this season was a *complete reverse* of the conditions experienced last year during the ski season in 2010-2011, when the industry set records for skier visits and snowfall totals; this season, there were records set for *lack* of snowfall and high temperatures, including the fact that March 2012 was recently announced as the *warmest month on record ever*. While NSAA strongly supports the 12-month look back, and the six month determination window, employees may reasonably expect to work full-time hours, but circumstances beyond the control of ski areas (and other like-minded seasonal employers) may dictate fewer hours, and there should be flexibility allowing for such scenarios – “based on the facts and circumstances.” Because ski areas are subject to the vagaries and whims of Mother Nature, flexibility is absolutely critical.

Accordingly, there should be a provision that even if a newly-hired employee reasonably expects to work full-time, and does so during the first three-months, seasonal employers like ski areas should have an option that if they can establish that due to circumstances beyond their control (and not just the cyclical nature of the business cycle), employers would not be subject to the Section 4980H penalty at the end of the three or six-month periods.

NSAA concurs with the provision laid out in the bullet point at the top of page 6 of the IRS’s notice – if the employee’s hours, reasonably viewed, are not fairly representative of the average hours to be worked on an annualized basis, the employer’s health benefit plan should receive an additional three-month period to determine the employee’s status, without a Section 4980H penalty. This option should be available to all employers, whether seasonal or not.

For example, if a newly-hired seasonal employee at a ski area works a significant number of hours during a couple of particularly busy weeks due to a heavy snowfall and the corresponding rush of skiers, but the hours taper off during slower periods due to the weather, it would not be representative, and the employing ski area should be given an additional period of time as a look-back period to determine the full-time status of that employee, without being subject to a Section 4980H penalty.

### **The Application of the 90-Day Waiting Period**

NSAA agrees with the provisions allowing employers to make coverage eligibility based on waiting periods up to 90 days of employment. While the PHS ACT 2708 allows for 90-day waiting periods, some clarifying regulations may be in order. One suggestion is that the 90-day waiting period be a provision that enables the waiting period to extend beyond 90 days if the employee is not continually working, i.e., allowing for additional waiting period to the extent the employee is experiencing an unusually high number of non-work days during this initial waiting period (sick days, military leave, disability time off, etc). This would be a very limited exception to a pure-90 day period – and it is not designed to extend the 90-day period without substantial justification – and such a provision could be narrowly construed and factually-based.

Similarly, because the ski industry would like an explicit provision that states seasonal employers may use the 90-day waiting period for *returning* employees coming back the following season, this should be seen as akin to a term of the benefit plans if it is applied to any employee who experiences a clear termination of employment for a period, say, for more than 60 days. Such a term of the plan is consistently applied to any employee who is terminated as a result of the seasonal nature of the business – i.e., it is not a rule designed to avoid compliance with Section 2708 (it’s been a traditional practice of the ski industry and other seasonal employers for years) – this should be deemed an acceptable plan eligibility criteria. This criterion, based on an existing widespread standing practice in the industry, would *not* be solely based on the lapse of time, but rather is a bona fide job requirement designed, in part, to encourage seasonal employees to be vested and committed for the full extent of the seasonal ski season. As such, applying the 90-day waiting period for returning seasonal employees should not be deemed to violate Section 2708.

Thank you for your consideration of these comments.

Sincerely,

*/s/ David Byrd*

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