



**National  
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*Creative Health Benefits Solutions for Today, Strong Policy for Tomorrow*

September 30, 2012

*Submitted via e-mail: [Notice.Comments@irs.counsel.treas.gov](mailto:Notice.Comments@irs.counsel.treas.gov)  
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The Honorable Douglas H. Shulman  
CC:PA:LPD:PR (Notice 2012-58)  
Room 5203  
Internal Revenue Service  
P.O. Box 7604  
Ben Franklin Station  
Washington, DC 20044

**Re: Notice 2012-58 – Determining Full-Time Employees for Purposes of Shared Responsibility for Employers Regarding Health Coverage**

**Notice 2012-59 – Guidance on 90-Day Waiting Period Limitation under Public Health Service Act § 2708**

Dear Commissioner Shulman:

The National Business Group on Health is pleased to comment on the Internal Revenue Service's, Department of Labor's (DOL's), and Department of Health and Human Services' (HHS's) (collectively, the Agencies') notices on determining full-time status of employees for purposes of the shared employer responsibility provisions under section 4980H of the Internal Revenue Code (Code) and the 90-day waiting period limitation under section 2708 of the Public Health Service Act (PHSA).

The National Business Group on Health represents approximately 347 primarily large employers, including 65 of the Fortune 100, who voluntarily provide health benefits and other health programs to over 55 million American employees, retirees, and their families. Our members employ and provide health benefits for employees under a wide variety of work arrangements, including full-time, part-time, seasonal, and temporary. In addition, our members often operate multiple lines of business and tailor employee work and benefit arrangements to the specific needs of each line of business.

As our members prepare for implementation of Code § 4980H, which we believe Congress intended to apply to coverage for employees only, and other new requirements under the Patient Protection and Affordable Care Act, a primary concern will be

minimizing the administrative and cost burdens associated with those requirements. Allowing plan sponsors flexibility to adapt their Affordable Care Act compliance procedures to existing work, benefit, and payroll arrangements will reduce these burdens and allow plan sponsors to devote more resources toward maintaining and improving health benefits for their employees. Therefore, the National Business Group on Health welcomes the Agencies' efforts, in implementing Code § 4980H and PHSA § 2708, to provide flexible and workable options for employers. Specifically, the National Business Group on Health supports:

- (1) Expansion of the safe harbor described in Notice 2011-36 such that employers can use measurement and stability periods of up to 12 months for ongoing and new variable hour or seasonal employees;
- (2) The option of using administrative periods of up to 90 days for ongoing and certain newly hired employees;
- (3) The safe harbor, based on employees' Form W-2 wages, for determining whether employer-sponsored coverage meets affordability requirements under the Affordable Care Act; and
- (4) For purposes of the 90-day waiting period limitation, the clarification that the limitation applies only to eligibility based on the lapse of time and not other eligibility conditions under plan terms.

We believe that this guidance will reduce administrative and cost burdens and allow plan sponsors much-needed flexibility in complying with Code § 4980H and PHSA § 2708.

The National Business Group on Health continues to support the Agencies' efforts to develop workable and flexible methods for maintaining affordable employer-sponsored coverage, and we encourage the Agencies to continue such efforts when developing regulations under Code § 4980H, PHSA § 2708, and other Affordable Care Act provisions affecting employers. **Specifically, the National Business Group on Health supports:**

- (1) **Additional guidance and examples clarifying when employers will be required to make employer responsibility payments under Code § 4980H;**
- (2) **For purposes of determining full-time status, expansion of permissible categories of employees to accommodate employees' current work and benefit arrangements;**
- (3) **Allowing employers to use a reasonable, good faith definition of "seasonal employee" for purposes of Code § 4980H after 2014;**

- (4) **Clarifying that requirements under Code § 4980H and PHSA § 2708 apply only to major medical coverage;**
- (5) **Allowing a safe harbor for de minimis errors when employers make a reasonable, good faith effort to comply with Code § 4980H and PHSA § 2708; and**
- (6) **Allowing flexibility in determining full-time status based on working 30 hours per week.**

We provide further discussion of these recommendations below.

### **I. Guidance on Employer Responsibility Payments**

The National Business Group on Health commends the Agencies for providing numerous examples for applying the rules proposed in Notices 2012-58 and 2012-59. These examples will be helpful in developing administrative procedures to implement measurement and stability periods for determining full-time status. However, a primary concern for our members remains potential liability for employer responsibility payments. While many of the examples in Notice 2012-58 describe the period during which an employer will not be liable for Code § 4980H payments, it would be very helpful to our members if the Agencies also provided examples of when employers would be liable for employer responsibility payments—for both ongoing and new employees—with specific guidance on when such payments would be due.

### **II. Expanding Permissible Categories of Employees**

Notice 2012-58 specifies four permissible categories of employees that employers can use when making full-time employee determinations. While these categories will likely cover most work arrangements, we recommend that the Agencies allow employers flexibility to use other categories, provided they do so in good faith, consistent with their business practices. As we note above, our members provide health benefits for employees under a wide variety of work arrangements and often tailor employee work and benefit arrangements to the specific needs of their different lines of business. Allowing such additional flexibility would minimize the administrative and cost burdens of complying with § 4980H.

### **III. Seasonal Employees**

We support the Agencies' guidance stating that at least through 2014, employers can use a reasonable, good faith interpretation of the term "seasonal employee." We believe that such flexibility will accommodate the various employment arrangements of our members and that it is unlikely that employers will manipulate this standard to minimize assessable payments. Therefore, we recommend that the Agencies continue to allow this standard for future years as well.

#### **IV. Application Only to Major Medical Coverage**

While we support the safe harbors described in Notice 2012-58, we note that this guidance likely will be very difficult to apply to certain types of benefits such as wellness programs, on-site health centers, and employee assistance programs. These benefits may fall within the definition of “group health plan” under ERISA but often are not offered under the same rules as those for major medical coverage. They may only supplement major medical coverage and in many cases are offered to all employees without cost. Because eligibility rules for these supplemental benefits are often different from those for major medical coverage, applying Code § 4980H and PHSA § 2708 to such benefits will involve substantial administrative and cost burdens that may provide an incentive to eliminate such benefits. Therefore, we recommend that the Agencies clarify that rules under Code § 4980H and PHSA § 2708 do not apply to such benefits.

#### **V. Safe Harbor for De Minimis Errors**

As noted above, the National Business Group on Health supports the Agencies’ efforts to allow flexibility and minimize the administrative burden of complying with Code § 4980H and PHSA § 2708. To that end, we ask the Agencies to consider that complying with Code § 4980H and PHSA § 2708 may involve substantial reprogramming of payroll and recordkeeping systems for our members, particularly if they must determine full-time status based on 30 hours of service per week. It is highly likely, particularly in the first years of implementation, that plans and their third-party administrators may make inadvertent errors in determining full-time status and enrolling employees based on such determinations. Therefore, we recommend that the Agencies allow a safe harbor for de minimis errors under which employers will not be subject to employer responsibility payments, provided employers make reasonable, good faith efforts to comply and correct such errors within a reasonable period after discovering the errors.

#### **VI. Flexibility in 30 Hours of Service Requirement**

As we note above, the National Business Group on Health supports the safe harbors for determining full-time status, as described in Notice 2012-58. However, we emphasize that a substantial burden for employers in implementing Code § 4980H will be in implementation of the 30 hours per week standard. Few of our members base full-time status or plan eligibility on this hours threshold. Many of our members use thresholds such as 35 or 40 hours per week. Implementing the 30-hour threshold will likely involve substantial reprogramming and changes to recordkeeping procedures—a substantial administrative and cost burden. Therefore, we recommend that the Agencies allow employers some flexibility in determining full-time status, based on their current standards for “full-time” employees or their current plan eligibility requirements.

Again, thank you for considering our comments and recommendations on determining full-time status of employees for purposes of the shared employer responsibility provisions under Code § 4980H and the 90-day waiting period limitation under PHSA § 2708. Please contact me or Steven Wojcik, the National Business Group on Health’s Vice

President of Public Policy, at (202) 558-3012 if you would like to discuss our comments in more detail.

Sincerely,

A handwritten signature in cursive script that reads "Helen Darling".

Helen Darling  
President