

NATIONAL COORDINATING COMMITTEE FOR MULTIEMPLOYER PLANS

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September 30, 2012

The Honorable Phyllis Borzi
Assistant Secretary
Employee Benefits Security Administration
U.S. Department of Labor
200 Constitution Avenue, NW
Room S-2524
Washington, D.C. 20210

VIA: e-ohpsca-er.ebsa@dol.gov

J. Mark Iwry
Senior Adviser to the Secretary and
Deputy Assistant Secretary for
Retirement and Health Policy
U.S. Department of Treasury
Departmental Offices
1500 Pennsylvania Avenue, NW
Washington, DC 20220

VIA: Notice.comments@irscounsel.treas.gov

Re: IRS Notice 2012-58

Dear Assistant Secretary Borzi and Deputy Assistant Secretary Iwry:

The National Coordinating Committee for Multiemployer Plans (the NCCMP) is pleased to submit these comments to IRS Notice 2012-58, "Determining Full-Time Employees for Purposes of Shared Responsibility for Employers Regarding Health Coverage (§4980H)

Background:

The NCCMP is the only national organization devoted exclusively to protecting the interests of the approximately 26 million workers, retirees, and their families who rely on multiemployer plans for health, retirement and other benefits. The NCCMP's purpose is to assure an environment in which multiemployer plans can continue their vital role in providing benefits to working men and women. The NCCMP is a nonprofit, non-partisan organization, with members, plans, and plan sponsors in every major segment of the multiemployer plan universe, including in the airline, building and construction, entertainment, health care, hospitality, longshore, manufacturing, mining, retail food, service and trucking industries.

The NCCMP has previously provided comments on a variety of ACA issues. In particular, we provided extensive comments regarding Notice 2012-17, “Frequently-Asked-Questions from Employers Regarding Automatic Enrollment, Employer Shared Responsibility, and Waiting Periods,” which raised many of the same questions as the instant Notice. These comments are attached for your reference.

We appreciate the opportunity to comment. However, we also note that the 30-day comment period is unusually short. Multiemployer plans have diverse structures and eligibility requirements, and it takes time to determine how the guidance will apply in different situations. Thus, these comments contain initial reactions to the guidance. We request that the agencies extend the comment period in order to allow further analysis and comments on these important issues.

The NCCMP has provided under separate cover comments to Notice 2012-59 and DOL Technical Release 2012-02. Those comments focus primarily on the waiting period requirement.

Brief Statement

With respect to the penalties under section 4980H, further guidance will be needed to determine how the penalties will be applied in the case of employers who contribute to multiemployer plans. Unlike the case with single employer plans, the plan sponsor and the employer are not the same, thus creating the need for guidance that accommodates this structure. In particular, it is important that employers know, when a contribution is made pursuant to the terms of the bargaining agreement, that a penalty will not be imposed.

The NCCMP had previously requested, in response to Notice 2012-36, that regulations provide that a contributing employer that has satisfied its responsibilities under the applicable collective bargaining agreement would not be subject to the shared responsibility penalty if it is making contributions to a multiemployer plan that provides health benefits. With respect to Notice 2012-58, we recommend that future guidance assure that employer will know that a penalty will not be imposed when they are making their required contributions under the collective bargaining agreement.

To that extent, it is important to understand that measurement and stability periods established by an employer may not be the same as the eligibility rules in a multiemployer plan, to which dozens or even hundreds of employers may contribute. Furthermore, the look-back stability period minimum and maximum standards (i.e., 12 months maximum look-back and six months minimum stability period) should not apply in the case of a multiemployer plan. Instead, the where an employer contributes to a multiemployer plan, the employer should be able to rely on the measurement and eligibility periods established by the trustees of the multiemployer plan.

We expect to have additional comments to Notice 2012-58 and appreciate the Departments' willingness to consider the application of the employer shared responsibility rule to employers that contribute to multiemployer plans.

We are available to expand upon and clarify any of the points described above at your convenience by phone or e-mail at the address captioned in our letterhead.

Respectfully submitted,

A handwritten signature in black ink, reading "Randy G. DeFrehn". The signature is written in a cursive style with a large, stylized initial "R".

Randy G. DeFrehn
Executive Director