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Notice 2012-58
Internal Revenue Service
Room 5203
P.O. Box 7604
Ben Franklin Station
Washington, D.C. 20044

Technical Release 2012-02
Office of Health Plan Standards and Compliance Assistance
Employee Benefits Administration, Room N-5653
U.S. Department of Labor
200 Constitution Avenue, NW
Washington, DC, 20210

Re: IRS Notice 2012-58 and DOL Technical Release 2012-02 Regarding Employer Shared Responsibility

To Whom It May Concern:

We submit this letter in response to IRS Notice 2012-58 regarding safe harbor approaches to determine which employees are treated as full-time employees for purposes of the employer responsibility provisions of the Affordable Care Act. This letter is also in response to related DOL Technical Release 2012-02 regarding the 90-day waiting period.

Safe Harbor Methods Could Increase Crowd-Out and Cost to Federal Government

The safe harbor methods described in Notice 2012-58 are likely to reduce the efficacy of the employer responsibility provisions of the ACA. The main purposes of the employer responsibility provisions were threefold: 1) to reduce crowd-out, or a shift from employer-based coverage to subsidized coverage in the Exchanges or Medicaid, 2) to provide a source of revenue to finance the premium tax credits received by employees with subsidized coverage in the

Exchanges, and 3) to level the playing field between firms that do and do not offer coverage.¹ Limiting the application of the employer responsibilities through the safe harbor methods will decrease the extent to which the ACA accomplishes these goals.

The presence of subsidized coverage in the Exchanges will decrease the incentive for certain employers to continue to offer coverage. Employers are likely to drop coverage if the cost of raising wages to enable workers to purchase coverage in the Exchanges plus the employer responsibility payment (taking into account tax implications) is less than the cost of an equivalent employer premium. Crowd-out is more likely when employers are not required to pay a penalty because the cost of allowing their workers to be covered through subsidized coverage is lower. The safe harbor methods will reduce the number of employees to which the responsibilities apply and could result in fewer employers offering coverage, increasing crowd-out.

The safe harbor methods could increase the cost of the ACA to the federal government because we predict lower tax revenue from employer penalties and higher enrollment in subsidized coverage in the Exchanges, compared to applying the penalties without a safe harbor. The Congressional Budget Office predicts \$808 billion in federal costs for Exchange subsidies and \$113 billion in federal revenue from penalty payments by employers between 2012 and 2022.² Reducing the application of the employer penalties is likely to have a non-trivial budgetary impact.

Finally, the limited applicability of the employer requirements would reduce the impact that the ACA has on leveling the playing field for firms because firms that do not offer affordable coverage will pay less in penalties with the safe harbor methods than without the methods.

In these comments, we identify ways in which employers could use these safe harbor methods to evade paying penalties. We also recommend ways that the safe harbor methods could be clarified and revised to ensure that the provisions apply broadly, as intended under the ACA, and to diminish the opportunity for evasion.

Safe Harbor Should not Apply to Non-Offering Firms

The safe harbor methods should not be an option for firms not offering coverage to employees. As described in Notice 2012-58, a primary justification for the safe harbor methods is to “protect employees from unnecessary cost, confusion and disruption of coverage, and to minimize administrative burdens on the... Exchanges...” These rationales do not apply to non-offering firms, therefore the safe harbor methods should not apply to these firms.

¹ Ken Jacobs and Jacob Hacker, “How to Structure a ‘Play-or-Pay’ Requirement on Employers: Lessons from California for National Health Reform,” UC Berkeley Center on Labor Research and Education and Berkeley Center on Health, Economic and Family Security Policy Brief, June 2009.

² Congressional Budget Office, “Updated Estimates of the Insurance Coverage Provisions of the Affordable Care Act,” March 2012, <http://www.cbo.gov/sites/default/files/cbofiles/attachments/03-13-Coverage%20Estimates.pdf>

Temporary Staffing

Question 1 of Notice 2012-58 seeks comments on “Whether and, if so, what types of safe harbor methods should be available to employers for use in determining the full-time status of... temporary staffing employees...”

We recommend that the safe harbor methods not be used for temporary staffing employees because the methods open up a number of possible ways in which the penalties could be evaded for these types of employees. For example, in order to continuously keep an employee in “new employee” status and categorize the employee as variable hour, firms may hire the same worker through successive temporary agencies or move them between regular employment and employment through a temporary agency. If safe harbor methods are allowed for temporary staffing employees, rules are needed to ensure that employment is counted continuously for employees whose work continues at the same worksite regardless of their employer of record.

High-Turnover Industries

Question 1 of Notice 2012-58 seeks comments on “Whether and, if so, what types of safe harbor methods should be available to employers for use in determining the full-time status of... employees hired into high-turnover positions...”

We recommend that the safe harbor methods not be available to employers in high-turnover industries. The methods outlined in the Notice would give employers in these industries a large incentive to claim new employees as variable hour employees and avoid paying the penalty or providing coverage for up to the first 13 months of employment. In high-turnover industries, many employees will separate from employment by the end of 13 months. For example, the restaurant industry had a 75 percent average annual turnover rate in 2008, according to the National Restaurant Association. If a new employee is classified as variable hour and works full-time during the measurement period, the employer would not be subject to the penalties during that time even if the employee is enrolled in subsidized coverage in the Exchange, in contradiction to the intent of the law. The limitation in application for new employees would make the employer responsibility provisions effectively non-binding on firms in high-turnover industries.

If a safe harbor option is available for high-turnover employers, we recommend that the full-time status of variable hour employees in these industries be determined on a workforce-level rather than on an employee-level. For example, the IRS could calculate the proportion of variable hour employees who had 30 or more hours of service per week on average during the previous tax year. That proportion would then be applied to the number of new variable hour employees during the following tax year in order to estimate the number of full-time employees for whom the employer would owe a penalty in that period. This approach would reduce the ability of employers to evade the responsibilities and would also allow for employer predictability.

Employees Not Working on a Year-Round Schedule

Question 1 of Notice 2012-58 seeks comments on “Whether and, if so, what types of safe harbor methods should be available to employers for use in determining the full-time status of... other categories of employees that may present special issues...”

The safe harbor methods should also be adjusted in industries in which employees work more than 120 days per year but only work during certain months of the year, such as educational settings. Allowing employers in this category to choose the length and timing of the measurement and stability periods opens up the potential for evasion. For example, a school district could choose a 6-month measurement period for ongoing employees from April 1 through September 30. Under this scenario, a classified school employee with 40 hours of service per week from September 1 through May 31 would be defined as part-time during the April 1 through September 30 measurement period and the school district would not owe a penalty for not offering coverage from October 1 through March 31, a time during which the employee works full-time. This scenario is inconsistent with the intent of the ACA. Furthermore, in this example, the employer is likely to be able to predict the employee's hours of service.

If safe harbor methods are allowed for these types of employers, we recommend that employees' full-time status be determined based on their hours of service during the period in which the regular work schedule is in effect, such as during the school year in educational settings.

Variable Hour Employee Definition

Question 2 of Notice 2012-58 seeks comments on "whether to develop additional guidance (such as relevant factors or safe harbors) to assist employers and employees in determining... whether the employee is a variable hour employee. If so, what types of factors or safe harbors should apply for this purpose?" Our comments also relate to Technical Release 2012-02 which allows employers to take a reasonable period of time to determine whether variable hour employees meet the plan's eligibility condition for purposes of the 90-day waiting period limitation.

We recommend that additional guidance be provided by the IRS and DOL in order to minimize the number of employees who are inappropriately designated as variable hour in order to evade the penalties and the waiting period limitation. Factors that employers should consider in determining whether a new employee is variable hour could include:

- Do hours vary for ongoing employees in similar classifications such that they work more than 30 hours in some months and less in others?
- Did hours vary for new employees in similar classifications in the previous tax year?
- If the employee's hours are expected to vary, will they vary in a predictable way? (For example, in retail, employees' hours may increase around the holidays, but employers may predict the variation based on prior holiday seasons.)
- Is the overall workload for the firm variable? If not, the employer is likely to have more control over workers' hours, and therefore more predictability.

In general, the right to use the safe harbor methods and the right to take a reasonable amount of time to determine eligibility for the coverage with regard to the waiting period limitation should be viewed as conditional on an employer not using the methods to evade the penalties or waiting period limitation.

The IRS and DOL should monitor the designation of "variable hour employees" by firms to detect abuse. Firms with an especially high share of variable hour employees with hours of

service that are consistently stable from month to month should no longer be able to use the safe harbor method or measurement periods. The IRS and DOL should develop a measure of variability in hours of service that is statistically sound and easy to administer.

New Employee Definition

The term “new employee” should be further defined in Notice 2012-58. The safe harbor methods allow greater flexibility for determining full-time status for new employees than ongoing employees, creating an incentive for employers to classify employees as new. Under the safe harbor methods, an employer could lay off a variable hour employee after one year of service, rehire them shortly thereafter and designate the employee as variable hour again. This would allow the employer to avoid paying any penalties for not offering coverage for more than two years even if the employee works full-time during those years. In order to prevent this type of evasion, the term “new employee” should be defined to exclude employees who had a short break in service or who worked at the same worksite under employment through a temporary staffing agency prior to being hired directly.

Full-Time Status should be based on Hours of Service

In Notice 2012-58, full-time status is sometimes discussed using language like “works on average at least 30 hours per week.” We recommend that subsequent guidance clarify that the definition of full-time status is based on “hours of service” as required by the ACA and as further outlined in Notice 2011-36 to include paid hours including vacation, holiday, sick leave, etc.

Probationary Periods of More than 90 Days should not be Allowable Eligibility Condition

Under Technical Release 2012-02, “eligibility conditions that are based solely on the lapse of a time period are permissible for no more than 90 days.” We recommend that DOL clarify in future guidance that probationary periods are one example of an eligibility condition that is based solely on the lapse of a time period. Probationary periods are typically defined by a period of time, as compared to eligibility conditions that require an employee to pass a test or gain a licensure which can be achieved in varying amounts of time by different employees. If probationary periods of any length were an allowable eligibility condition, employers could simply avoid the waiting period limitation by lengthening employees’ probationary periods.

Thank you for the opportunity to submit these comments.



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