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Delivered Electronically

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To Whom It May Concern:

We submit this letter in response to **Internal Revenue Service (IRS) Notice 2012-58** and the **Department of Labor (DOL) Technical Release 2012-02**. Notice 2012-58 requests comments on safe harbor methods employers may use when determining which employees will be considered full-time for the purposes of the shared employer responsibility provisions of §4980H of the Internal Revenue Code (IRC). The August 31, 2012 Guidance on the 90-Day waiting period limit solicits comments on what the Agencies will consider compliance with PHS Act 2708, including guidance on how these provisions interact with the safe harbor methods described in Notice 2012-58.

The Service Employees International Union ("SEIU") represents over two million workers, including healthcare and long term workers, members in the building cleaning and security industries and public sector employees. Our members receive employment based health benefits through multi-employer plans, government plans and employer sponsored plans, but many workers in these industries, especially low wage workers, do not have employer sponsored coverage or do not have coverage they can afford.

SEIU has a deep interest in the successful implementation of the shared responsibility provisions of the Affordable Care Act (ACA). We are eager to ensure that these provisions fulfill Congress' goal of achieving "near-universal coverage by building upon and strengthening the private employer-based health insurance system" (42 USC § 18091(a) (3) (D)). We thank you for the opportunity to participate in the process of developing regulatory guidance regarding these critical provisions of the ACA.

Sincerely,

Carol Golubock
Director of Policy

Amy Adams
Coordinator, Health Policy

Notice 2012-58

Notice 2012-58 expands on previous guidance (Notice 2011-36 and Notice 2011-73) describing "safe harbor" methods employers may choose to use to determine which employees are treated as full-time for the purposes of the Affordable Care Act's employer responsibility assessment (as provided for under IRC Section 4980H). This notice provides employers the option of using a "look-back" measurement period of up to 12 months to determine whether a "variable hour" or seasonal employees are full-time. An employer may deem an employee a "variable hour employee" if, based on "the facts and circumstances" at the employee's start date, it cannot be determined that the employee is "reasonably expected" to work on average at least 30 hours per week. Employers may choose the measurement period's duration (between three and twelve months), as well as when it begins and ends, and may use this "safe harbor" not only for new employees but for ongoing employees as well.

In previous comments, submitted June 17, 2011 (Attachment A) and April 5, 2012 (Attachment B), SEIU registered serious concerns about look back periods extending beyond 90 days. We reiterate our concerns in these comments. In Notice 2012-36, Treasury cited employer's inability to forecast or avoid potential liability, and the undesirable result that employees will move into and out of employment-based coverage on a monthly basis as one rationale for the safe harbor approach proposed. (Notice 2011-36, p. 13-14). In Notice 2012-58, Treasury reiterates this rationale, including "protecting employees from unnecessary cost, confusion and disruption of coverage and to minimize administrative burdens on the Affordable Insurance Exchanges." (Notice 2012-58, p.2).

Based on our experience, we find these concerns to be overstated. First, it is unlikely that employees will move into and out of employer based coverage on a regular basis because employers are unlikely, for plan administration reasons, to move employees into and out of coverage month-to-month. SEIU represents workers in sectors where there is significant variance in hours worked by an employee month to month. Many multiemployer plans providing health benefits to these workers create eligibility rules that provide multiple months of stability demonstrating that such coverage is possible.

Second, employers are able to, and should be expected to, factor potential 4980H liability into their hiring decisions, as they do with respect to many other liabilities such as payroll taxes, unemployment insurance premiums, and all other costs associated with employing people. They have the information they need to make predictions because they know the number of full-time versus part-time employees they have previously and customarily employ and they are the ones making the decisions regarding hiring.

For these reasons and others, by allowing employers wide-ranging discretion over the length and scheduling of measurement and stability periods as well as over the definition of "variable hour" and "seasonal" employee, Treasury has created a system highly vulnerable to abuse. Employers will have an incentive to apply the variable hour classification in an overly broad manner to extend the period during which they are not responsible for contributing to their employees' healthcare coverage. For example, in settings where there is some limited fluctuation in staffing, employers may now decide to categorize virtually all their new employees as "variable hour" employees (e.g., nursing home settings where resident census may vary somewhat monthly). They can then delay contributing toward new employees' healthcare coverage costs for at least 13 months, even if these workers average over 30 hours of service per week. Unscrupulous employers, particularly those in high-turnover sectors and settings where employers have a reduced workforce during certain periods (e.g., schools) will find it easy to manipulate schedules and measurement periods to both avoid offering insurance and avoid contributing to the public cost of covering their employees for substantial periods of time.

At-will employers may also simply fire new “variable hour” employees who worked full-time during their initial measurement period and then immediately rehire them, classifying them as “new employees” and beginning the initial measurement period again. We have already received anecdotal reports of employers discussing this strategy.

The employer responsibility provisions were designed to build on and strengthen the existing employer based insurance system. Treasury notes that one of their goals in this guidance is to “encourage employers to continue providing and potentially to expand group health plan coverage for their employees.” However, rather than promoting employer responsibility, the proposed safe harbor system reinforces the gap between employers that “play by the rules” and offer their full-time employees coverage and those who advantage their bottom line by shedding all responsibility for contributing to healthcare coverage.

But even where an employer “plays by the rules” and does not intentionally seek to manipulate the system, under the safe harbor method as described in this guidance, an employee can work full-time for 13 months before the employer offers the employee minimum essential coverage or contributes to the cost of coverage through the 4980H assessment. This directly contradicts Section 2708 of the Public Health Act, as amended by the Affordable Care Act. Section 2708 provides that, for plan years beginning on or after January 1, 2014, a group health plan or health insurance issuer offering group health insurance coverage shall not apply <u>any</u> waiting period that exceeds 90 days (emphasis added). Notice 2012-58 and the August 31, 2012 Guidance on the 90-day Waiting Period Limitation allows for a discriminatory two-class system, whereby, in practice, an employee deemed to be “regular, full-time” must be offered insurance within 90 days (or the employer must contribute via the 4980H assessment), while a “variable hour” employee, even one working the exact same number of hours and performing the same duties as the “regular” employee, may go without an offer of minimum essential coverage for 13 months while his/her employer faces no liability.

We continue to believe the costs of the proposed safe harbor approach outweigh its benefits. We have specific concerns about those employees who may not be eligible for ACA-related coverage. If employers abuse the system to avoid coverage obligations under the law, these individuals will be without coverage and continue to utilize emergency care for which hospitals and other providers are not compensated. In addition, the Department of Health and Human Services (HHS) recently published interim final regulations on August 30, 2012 that prohibit Deferred Action for Childhood Arrivals (DACA) beneficiaries from accessing ACA related coverage. If employers use this system to avoid coverage requirements, these individuals will not have access to coverage though they are legally able to obtain employment in the United States.

However, as Treasury has now confirmed that these safe harbor options will be provided to employers through 2014, we believe there are some essential precautions and safeguards that must be put in place to reduce employer abuse. These include:

- Shortening the measurement period in high turnover sectors
- Adding strong oversight, enforcement and protection measures
- Using a more appropriate monthly hours equivalent
- Adjusting the approach for non-calendar year/seasonal settings

- Ensuring the unit of measure is hours of service, including paid time off and time for which compensation is owed
- Appling the W-2 safe harbor inquiry only to individual coverage

In the pages that follow, we describe these suggestions in greater detail.

Shorten the Look Back Period in High Turnover Sectors

We have argued that a long look-back period is unnecessary and opens the system to greater employer abuse. In high turnover sectors, a look-back period that lasts up to 12 months renders the employer responsibility provision essentially meaningless. We previously recommended limiting the maximum length of the measurement period to no more than three months. If Treasury moves forward with the system described in the notices, we recommend that Treasury limit the measurement period to no longer than three months in high turnover sectors.

Oversight, Enforcement and Protection Measures Must Be Implemented

Ensure Oversight and Enforcement

As noted above, the proposed safe harbor for variable hour and seasonal employees is highly vulnerable to employer abuse and manipulation, particularly in high turnover settings. To address this, Treasury must, at a minimum, create and implement oversight, enforcement and protection mechanisms. While this is particularly true in high turnover settings, the oversight and enforcement mechanisms we suggest here would be relevant and could be applicable to all settings.

Treasury must identify a series of red flags that would indicate inappropriate use of the safe harbor. These can include simple and obvious first “screens” to help prioritize sectors and employers for examination and then a series of narrower, more specific screens or red flags to further identify fact patterns suggesting potential fraud and abuse and warranting comprehensive investigation. For example, sectors and employers with a high proportion of variable and seasonal employees could be prioritized for examination. At the employer level, a simple initial screen would be a high number or proportion of employees from a single employer receiving subsidies on the Exchange while the company does not pay the 4980H assessment over the course of one year. Another red flag indicating potential abuse would be if a high proportion of employees considered “variable hour” in the initial measurement period receive employer-sponsored insurance in the following stability period.

Substantial penalties are needed to serve as a deterrent against future and widespread manipulation. Therefore, where inappropriate use of the safe harbor is identified, the 4980H assessment must be levied not only going forward but also retroactively. Employers must lose the privilege of using the safe harbor method when it has been determined that they are inappropriately manipulating the system. In addition, employers should be subject to a punitive fine, in addition to the retroactive 4908H assessment for employees considered full time during the stability period to further discourage subversion of the rules. A punitive element adds greater upfront risk and should be a more substantial deterrent.

There are a variety of ways Treasury could approach defining abuse of the safe harbor. For example, Treasury could create a measure of variance in work hours and use this to assess companies’ application of the “variable hour” employee category. If work hours for the group classified as variable hour employees were found to be consistently <u>not</u> variable (over 30 hours a week), then the employer would be prohibited from continuing to use the measurement/stability period safe harbor going forward and would be required to pay the 4980H assessment retroactively on this group.

"Finally, Treasury needs to affirmatively state in guidance that employers are not permitted to classify employees who regularly work over 30 hours per week as “variably employed” if this is done with the purpose of making otherwise eligible employees ineligible for employer sponsored coverage. Similarly, guidance should be clear that if employers reduce hours or lay off employees with the purpose of making otherwise eligible employees ineligible for employer sponsored coverage, such behavior may result in penalties and other enforcement actions, for example, those described in our comments.

Track Necessary Information

Regardless of the exact identification and enforcement mechanisms used, Treasury must track the relevant information, share information and coordinate with and actively engage other relevant agencies (such as DOL and HHS), and commit the necessary resources to investigation and enforcement. Under the ACA, every applicable large employer is required to meet the requirements of section 4980H with respect to its full-time employees during a calendar year. As part of these requirements, every offering employer must submit a return to the Secretary and must report the terms and conditions of the health care coverage provided to the employer's full-time employees for the year as well as “such other information as the Secretary may require” (Section 6056).

In addition to the information detailed in statute, employers should be required to include in this return each employee’s status (e.g., “regular full-time,” “variable hour,” “seasonal”), the time period for such classification (e.g., relevant if an employee moved from one status to another during the reporting period), and the measurement, administrative and stability periods start and stop dates. Employers failing to report such information should be prohibited from using the safe harbor going forward. To determine the impact of this policy on employee turnover and assist in identifying manipulation of the “new variable hour employee” classification as a means of avoiding the 4980H assessment, it would be useful to track the annual number of new hires and terminations from firms using this safe harbor. The information outlined in the paragraph above will also allow Agencies to assess the pervasiveness of the safe harbor’s use overall and whether safe harbor rules are actually necessary.

Tighten Definition of Variable Hour Employee

We recommend that additional guidance be provided on the definition of variable hour employee. This additional guidance should be aimed at reducing opportunities for employers to inappropriately designate employees as variable hour employees in order to avoid contributing to the cost of healthcare coverage for their workers. Factors that employers should be required to consider in determining whether a new employee is variable hour could include:

- Do hours vary for ongoing employees in similar classifications?
- Did hours vary for new employees 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.

According to the statute, a full-time employee is an individual who, "with respect to any month, an employee who is employed on average at least 30 hours of service per week." (26 USC 4980H(c)(4)(A), emphasis added) To better comply with the statutory requirements and definition of full time workers, Treasury should set a common sense boundary around the designation of employees as "variable hour" that is based on average hours of service per week per month. For example, if, over the course of the look-back period, the majority of a variable hour employee's months have contained an average of 30 hours of service per week or more, this employee should reasonably be considered full-time. Employers should not be allowed to classify employees who regularly work over an average of 30 hours per week per month as "variable hour" employees. Treasury should adopt this interpretation as part of additional changes and enforcement mechanisms to the safe harbor included in our comments in order to prevent employers from undermining the law.

Existing Employees Should Not be Subject to New Measurement Period

The guidance is not clear regarding workers already employed by a company in 2014. As these employees already have work histories, employers should be required to use past months of service as a measurement period or towards the completion of a measurement period. Employers should not be allowed to treat these employees as "new" or require them to participate in a new measurement period, as employers have the data necessary to determine their status under these rules.

Employers Must Notify Employees of Variable Hour Status

Most employees will not be familiar with the newly created category of "variable hour" employee nor its implications. There will be confusion over how this category intersects with other classifications or categories used in employers' policy manuals, employee handbooks, human resources documents and collective bargaining agreements. Additionally, for those variable hour employees seeking coverage on the Exchange, some simple and immediately available documentation will be needed to prove these workers do not have a qualified offer of employer coverage.

Employers should be required to notify employees of their "variable hour" status, in writing and no later than the start date of the employee's measurement period. The notice should explain the implications of this status for the employee's healthcare coverage options, including stating that the employee may potentially be eligible for subsidized coverage on the Exchange during any period where the employer is not offering minimum essential coverage. Such a notice must cite the full-time standard of 30 hours of service per week, identify start and end dates for measurement, stability and administrative periods, and must clearly identify the date by which an offer of coverage must be made or the employer is liable for the 4980H assessment if the worker is found to be full-time. The Notice must describe options for redress if the employee contests his/her status, believes s/he is inappropriately categorized as "variable hour" or, after the measurement period, as part-time, rather than full-time. In addition, the notice should include appropriate contact information for the DOL if individuals wish to register a complaint. Such information may also allow DOL to assist Treasury in oversight and enforcement; if for example, DOL receives a large number of complaints regarding a specific employer. Presentation of such a notice to Exchange should constitute legal proof that the employee does not have minimum essential employer sponsored coverage.

Evaluate Approach After Year One

The system being proposed is highly complex and there are serious concerns about whether it fulfills the statutory intent of the employer responsibility provisions. Because of this, Treasury, HHS and DOL should assess the efficacy of the safe harbor provisions after one year of implementation. This process should rely on the data gathered above, as well as input from stakeholders including workers and their authorized representatives. For this reason, we appreciate that the guidance, if finalized, will only remain effective until January 1, 2015.

Monthly Equivalent Standard Should be 120 Hours

Section 4980H provides that "full-time employee" means, "with respect to *any* month, an employee who is employed on average at least 30 hours of service per week." (Section 4980H(c)(4)(A), emphasis added). The Notice states that, as previously outlined in Notice 2011-36, "130 hours of service in a calendar month would be treated as the monthly equivalent of 30 hours of service per week." (p. 5, footnote 3). As we stated in our previous comments, this approach is inconsistent with the statute because 130 hours per month is not, in fact, the equivalent of an average of 30 hours per week. In five of the seven calendar months – February, April, June, September, and November – an employee may average 30 hours of service per week, and not have 130 hours of service in the month and therefore fail to be considered full-time. Using a monthly equivalent of 120 hours of service assures that all employees averaging at least 30 hours of service per week in any calendar month will be included, as clearly intended by the statutory language.

Adjust for Seasonal and Non-Calendar Year Schedules

Specific attention must be given to seasonal employment and to industries or sectors which don't follow a traditional calendar year. Any provision for determining full-time employee status should account for this employment model in a way that accurately counts the number of full-time employees and appropriately classifies full-time workers as such. This includes sectors which employ significantly fewer employees or reduce the hours of many employees during certain months of the year. Some examples would include educational settings, which generally employ far fewer full-time employees during the summer months, or some stadiums or sports arenas that employ far fewer workers during the "off season."

In such cases, it would be inappropriate to allow a 12 month measurement period as many workers now considered "full-time" for purposes of plan eligibility and offered employer sponsored coverage could be classified as part-time if hours of service were measured over 12 months. We suggest that, in cases where an employer customarily operates on a partial year basis, the appropriate definition of full-time is a worker averaging 30 hours of service per week per month during the period in which the employer is engaged in the direct performance of its operational mission in the particular setting. It would be important that the standard be tied to the setting dictating the work calendar. For example, food service workers in an educational setting might be employed by a subcontractor whose business is on a 12 month calendar elsewhere but whose workforce in the school setting works the academic year.

For the purposes of this safe harbor, those workers who may be subject to a seasonal work cycle, for example those who may work in tourist industries or stadium/event staff, should not be considered new employees subject to a new initial measurement period each time a new "season" begins or after they have a limited break in service. In these scenarios, past periods of service should be used to determine status and such individuals should be treated as ongoing employees. Employers in these scenarios should have the necessary data to determine status from previous periods of employment.

Unit of Measurement Must Be Hours of Service, Including Paid Time Off And Hours For Which Payment is Entitled

Notice 2011-36 appropriately referred to "hours of service," rather than "hours of work" as the unit of measurement for the determination of full-time status. Notice 2011-58 appears to abandon "hours of service" and refers to "hours of work" when describing the unit for measuring full-time status. While we assume this is a simple drafting error, it is vitally important that Treasury correct this. The appropriate unit of measure is "hours of service," and should include not only hours for which an employee is paid for the performance of duties as well as hours when no duties are performed (i.e., paid time off), but should also include hours for which an employee is entitled to payment. As noted in our previously submitted comments, we strongly support this approach, which permits enforcement agencies to adjust non-payment or under-payment of assessments under the ACA.

No Cap on Paid Time Off

While not directly addressed in this guidance, previously released Notice 2011-36 suggests that in calculating an employees' hours of service, "no more than 160 hours of service will be counted for an employee on account of any single continuous period during which the employee was paid or entitled to payment but performed no duties." We reiterate that capping hours of service for continuous periods of paid leave at 160 hours is too restrictive. Such a cap will result in employees who are on extended leave dropping out of full-time employee status if their approved leave extends into multiple months. This will create an incentive for employers to drop employee coverage during extended periods of paid leave. Such periods would most commonly be due to maternity or extended illness, precisely the situations where a disruption in coverage could be most problematic for the employee. Employers do not benefit from any increased predictability by capping employee's paid leave when calculating their 4980H liability; they already know their liability, based on the number of full-time employees they employ. There should be no cap on hours of service for continuous periods of paid leave when calculating an employee's hours of service.

Employee Safe Harbor For Limited Unpaid Time Off

Treasury states that, in crafting this guidance, it sought to create a system providing reasonable predictability for employers and avoiding disruption of coverage for employees. To this end, Treasury should create some type of "safe harbor" to allow for limited periods of non-paid time off without triggering a change in employee full-time status or impacting the employer's 4980H assessment liability. In these cases, employers also should be prohibited from "restarting" the measurement clock, as if these employees were bona fide new hires. Employees, particularly in low-wage sectors, may have no or very limited paid time-off and may find it necessary to take unpaid time off in cases of personal or family illness or other types of emergencies. In no case should this impact the employee's ability to maintain their current coverage. Nor should these limited duration situations impact what employers have identified as their primary concern regarding liability for the 4980H assessment, namely, predictability.

<u>Affordability Safe Harbor Inquiry Should Only Look at Individual Coverage</u>

Notice 2012-58 confirms that employers will not be subject to the 4980H (b) assessment for an employee if the coverage offered to that employee was affordable based on the employee's Form W-2 wages ("the affordability safe harbor"). As we stated in our comments on the earlier guidance (Notice 2011-73 and Notice 2012-17), the inquiry should not examine whether the employer offers dependent coverage. While we would like to see employers offer affordable family coverage, family coverage is expensive. We are concerned that, if the affordability safe harbor requires an offer of coverage to dependents, employers will offer family coverage that is high cost and unaffordable to low-income families. The expensive offer of family coverage will keep family members uninsured as they will not be eligible for premium tax credits under the affordability determination proposed in REG-13149-10.

Department of Labor Technical Release 2012-02

Coordinate with Enhanced Enforcement and Protection Measures for Employer Safe Harbor

DOL has sought to coordinate its guidance on the 90 day waiting limitation with Treasury's guidance on the determination of workers' full-time status for the purposes of the 4980H assessment (Treasury Notice 2012-58). Notice 2012-58 expands the previously proposed safe harbor method employers may choose to use when determining the full-time status of variable hour and seasonal employees for purposes of the 4980H assessment. We appreciate the efforts of all three agencies (HHS, Treasury, and DOL) to work cooperatively and coordinate the complex intersecting policies provided under the ACA. Elsewhere in these comments, we have strongly recommended additional oversight, enforcement and protection measures be implemented to reduce abuse of the safe harbor provisions outlined in Notice 2012-58. We recommend that DOL align its guidance on the 90 day waiting period limitation with these enhanced oversight and enforcement measures. For example, in the case where gaming of the aforementioned safe harbor provision is identified, and employees who would otherwise be required to receive coverage no later than 90 days after employment begins were incorrectly subject to a measurement period beyond 90 days, such action should be considered designed to avoid compliance with the 90 day waiting period.

Limit Allowance of Cumulative Hours Requirements to Part-Time Workers

We support the DOL's determination that a cumulative hour requirement of up to 1,200 hours is permissible in the case of group health plans offering coverage to part-time employees, as described in the example outlined in the guidance (Example 4, p.4). Such requirements are regularly used by employers and provide individuals who may not otherwise be able to access employer sponsored insurance, a pathway to coverage. Based on information from employers and group health plans, we believe 1,200 hours to be a reasonable and practical limit. However, we oppose allowing any cumulative hour requirement for full-time workers. This would directly undermine the 90 day waiting period limitation as well as impact the application of the 4980H assessment.

Address Terms of Eligibility That May Undermine the 90 Day Limit

DOL and Treasury have defined the waiting period as "the period of time that must pass before coverage for an employee or dependent who is otherwise eligible to enroll under the terms of the plan can become effective." (p.2). While we agree with the determination that a condition of eligibility that is based on a lapse of time alone is a de facto violation of the law, Treasury must consider and address other eligibility conditions and plan terms that may undermine the 90 waiting period limitation. Specifically, we have concerns about hybrid situations, where an employer requires completion of a requirement to trigger eligibility for coverage. It is important to ensure that such terms of eligibility not be used to extend a waiting period beyond 90 days. For example, employers may use a probationary period that ends upon the completion of a test or training. There may be cases where the test or training is not made available within the 90 day waiting period window. If such probationary periods are considered permissible terms of eligibility under the 90 day waiting period limitation, employers will be free to impose any number of new probationary requirements, deem them a condition of eligibility and use them to avoid offering coverage within the 90 day period. Because of this, we believe that probationary periods should be de considered designed to avoid compliance with the 90-day waiting period.

Should DOL choose to consider such terms acceptable under the waiting period limit, it must create specific boundaries or tests to ensure these terms are not imposed for purposes of evading the law. For example, while in certain cases, such trainings, tests, or certifications may be beyond the employers control, for example in cases where only outside certified organizations, states, or the federal government administer such tests, in other cases, the completion of such requirements may be within the control of the employer. One possible solution would be to require employers to administer trainings and tests under their control within the 90 day waiting period for new hires if an employer chooses to condition coverage on the completion of some action.

The Department of Labor may also examine if a requirement is imposed by law or self-imposed by the employer as a possible indicator of employer action to purposely subvert the law. However, that test alone should not be used as a safe harbor but could be used as one factor in an examination of employer intent. This is because in certain instances, even when a law requires certifications or licensures, the administration of trainings and tests may still be within the control of the employer.
In conclusion, DOL should engage in a fuller examination of potential scenarios in order to ensure that employers don't undermine requirements and newly hired individuals are able to access coverage as soon as possible.

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June 17, 2011

VIA ELECTRONIC MAIL

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Re: CC:PA:LPD:PR (Notice 2011-36)
Request for Comments on Shared Responsibility for Employers Regarding Health Coverage (Section 4980H)

To Whom It May Concern:

We submit this letter in response to Notice 2011-36 ("Notice"), requesting comments on various rules, definitions and approaches for interpreting and applying the shared employer responsibility provisions of §4980H of the Affordable Care Act ("ACA") and the 90-day waiting period limitation enacted by §1563 of the ACA. We thank you for the opportunity to participate in the process of developing regulatory guidance regarding these critical provisions of the ACA.

The Service Employees International Union ("SEIU") represents 2.1 million workers, advocating to improve their lives and the services they provide. SEIU is the largest healthcare union with more than 1.1 members in the field, including nurses, LPNs, doctors, lab technicians, nursing home workers, and home care workers. As the largest property services union, SEIU represents 225,000 members in the building cleaning and security industries, including janitors, security officers, superintendents, maintenance workers, window cleaners, and doormen and women. With more than 1 million local and state government workers, public school employees, bus drivers, and child care providers, SEIU is the second largest public services union. Our members receive employment based health benefits through multi-employer plans, government plans and employer sponsored plans, but many workers in their industries, especially low wage workers, do not have employer sponsored coverage.

As one of the strongest advocates for passage of health reform, SEIU has a deep interest in the successful implementation of the shared employer responsibility and 90-day waiting period limitation provisions of ACA in a manner that is consistent with the legislative goal of building off of employment-based health insurance. We hope the following comments will help guide the Department of the Treasury, Department of Labor, and Department of Health and Human Services (collectively "the Departments") in developing regulations that promote that legislative goal, resulting in expanded, affordable health coverage for millions of working people.

Definition of Employer, Employee and Hours of Service

How "Employer" And "Employee" Would Be Defined
(Notice Sec. III(A) and (B))

The Notice suggests that "employer" and "employee" be defined, for the purposes of §4980H, by using the common-law tests. Notice pp. 5-6. We believe this approach is too narrow.

Under common law, an "employer" is defined as an entity who "exercises control over an employee" and, conversely, an employee is defined as "any individual employed by an employer." Nationwide Mutual Ins. Co. v. Darden, 503 U.S. 318, 323 (1992). It is more appropriate, however, to use broader definitions, such as those found in the Fair Labor Standards Act ("FLSA"). Under FLSA, "employer" includes "any person acting directly or indirectly in the interest of an employer in relation to an employee," and an employee is any individual employed by an employer so defined. 29 U.S.C. §203(d), (e)(1). This standard looks to the economic reality of the totality of the circumstances bearing on whether the putative employee is economically dependent on the alleged employer. See Baystate Alternative Staffing, Inc. v. Herman, 163 F.3d 668, 675 (1st Cir. 1998). That the automatic enrollment provisions of §1511 of the ACA, requiring certain employers to automatically enroll new full-time employees into one of their health plans, are incorporated into §18A of the FLSA, means that the broader FLSA definitions will control which employees are to benefit from those provisions. The FLSA definitions should therefore also govern who is an employee for purposes of the employer responsibility provisions. Employers should be able to operate under one set of definitions for compliance with the provisions of the ACA.

The ACA generally, and the shared responsibility provisions in particular, are "designed to promote expanded, affordable health coverage." Notice p. 1. Indeed, in enacting §4980H, Congress contemplated that §4980H would "achieve[] near-universal coverage by building upon and strengthening the private employer-based health insurance system." 42 U.S.C. 18091(a)(3)(D). Thus, broader, more expansive definitions of employer and employee, which would capture more entities and individuals under the shared employer responsibility provisions, and which would provide more people with employer-based health coverage, more effectively promotes the stated purposes of the legislation.

Definition of "Hours of Service"
(Notice Sec. III(C))

The monthly equivalent standard

§4980H provides that "full-time employee" means, "with respect to any month, an employee who is employed on average at least 30 hours of service per week." §4980H(c)(4)(A). The Notice suggests that 130 hours in a calendar month be treated as the monthly equivalent of the statutory standard of "at least 30 hours of service per week." This approach is inconsistent with the statute because 130 hours per month is not, in fact, the equivalent of an average of 30 hours per week.

If the regulations use a 130 hours per month standard, employers with the requisite number of employees working at least 30 hours per week will be exempted from the coverage of the employer responsibility provisions, potentially resulting in fewer employees covered by employer sponsored coverage, more employees receiving tax credits, and a larger cost to the federal government.

In five of the seven calendar months – February, April, June, September, and November – an employee may average 30 hours of service per week (an average of 4.3 hours of service per day), and not have 130 hours of service. In the month of February, which has 28 days, such employee may have worked only 120 hours; in April, June, September, and November, each of which have 30 days, she may have worked only 128 hours. Thus, in more than 40% of the calendar months, an employee averaging 30 hours of service per week – a full-time employee under the statutory definition – may not be deemed a full-time employee under the proposed regulatory approach.

Even if several months are considered in the aggregate, a similar result occurs. For example, consider the three (3) month period of February, March and April, which have 29, 31 and 30 days, respectively, for a total of 89 days. An employee who averaged 30 hours of service per week (an average of 4.3 hours of service per day) may have a total of 382.7 hours of service during this three month period, an average of only 127.6 hours of service per month. Thus, this employee, who averages 30 hours of service per week – a full-time employee under the statutory definition – would not be deemed a full-time employee under the proposed regulatory approach.

Consideration of actual outcomes in the calendar year 2014 – the first year in which the shared employer responsibility provisions are in effect – further demonstrates that a monthly equivalent of 130 hours is too high to capture all employees who work an average of at least 30 hours per week. For example:

- An employee working six (6) hours each day from Monday through Friday would satisfy the statutory requirement of 30 hours of service per week. However, she will work less than 130 hour in the months of February, March, June, August, and November of 2014. Further, if this employee has a single unpaid day off (i.e. holiday, vacation, sick, etc.) in the months of April, May or September 2014, she will work less than 130 hours and fail to qualify as a full-time employee in that month as well.

- An employee who works ten (10) hours a day on Tuesdays, Wednesdays and Thursdays would satisfy the statutory definition of full-time employee as she works 30 hours per week. However she will work less than 130 hours in the months of February, March, June, August and November of 2014.

Accordingly, using a monthly equivalent of 130 hours of service in a calendar month is contrary to the express language of §4980H(c)(4)(A) which clearly states that an employee who averages at least 30 hours of service per week "with respect to *any* month" (emphasis added) is a full-time employee. As a monthly equivalent of 130 hours may exclude from designation as full-time employees many employees who in fact work 30 hours per week or more, thereby excluding many employers as applicable large employers, this approach is inconsistent with the purposes of the statute.

If a monthly equivalent is used, we suggest that the appropriate equivalent is 120 hours in a calendar month. That equivalent will capture all employees who average at least 30 hours of service per week in *any* calendar month (including the employees in the examples provided above) and, therefore, will conform to both the plain language of §4980H, and the underlying ambitions of the shared employer responsibility provisions – to "achieve[] near-universal coverage." 29 U.S.C. §18091(a)(3)(D).

<u>Inclusion of hours for which an employee is entitled to payment</u>

The Notice suggests that an employee's hours of service would include not only hours for which an employee is paid for the performance of duties or when no duties are performed, but also hours for which an employee is entitled to payment. Notice p. 6. We strongly support this approach, which permits enforcement agencies to adjust non-payment or under-payment of assessments under the ACA . By including not only time for which employees are paid, but also time for which they are *entitled to be paid*, the regulations appropriately account for those situations where an employer fails to satisfy its obligation to pay wages. If it is later discovered by the Internal Revenue Service that the employer failed to satisfy its obligation to pay wages, the Service would be able to recover any penalty owed.

<u>160-hour cap for continuous periods where employee performed no duties</u>

The Notice suggests that in calculating an employees' hours of service, "no more than 160 hours of service will be counted for an employee on account of any single continuous period during which the employee was paid or entitled to payment but performed no duties." Notice p. 6. We believe capping hours of service for continuous periods of paid leave at 160 hours is too restrictive. It will result in employees who are on extended leave dropping out of full-time employee status if their approved leave extends into multiple months.

As noted above, the ACA generally, and the shared responsibility provisions of §4980H in particular, are designed to "increase the number and share of Americans who are insured." 42 U.S.C. 18091(a)(2)(C). Therefore, the regulatory scheme should be designed to produce results that will, consistent with the statutory language, lead to more employment-based health coverage. Drafting regulations that take a broad approach to determining whether an employee is a full-time employee will achieve such results. Regulations that would limit the number of full-time employees in a manner not required by the statute, such as the 160-hour cap suggested in the Notice, are in conflict with the purposes of §4980H and are, in our opinion, the wrong approach.

The proposed 160 hour cap also contradicts benefits provided for in the Family Medical Leave Act ("FMLA"). The FMLA requires certain employers to provide continuous leave for twelve weeks, during which time the employer is required to maintain coverage under any group health plan. <u>See</u> 29 USC §§2612(a)(1), 2614(c)(1). For employees working 30 hours per week – full-time employees under the ACA – the FMLA requires employers to permit a continuous leave of at least 360 hours and to continue to provide health coverage during that period; for employees working 40 hours per week, the leave with continued health coverage must be permitted for at least 480 hours. Thus, the 160 hour cap suggested in the Notice would fail to credit up to 320 hours of FMLA-required leave. Those employees whose paid leave covers 480 hours and is taken over several months will only be considered full-time for at most the first two months for which they are on leave. For example, if an employee's paid leave starts in one month in which they take 30 hours of leave and the next month they take 130 hours, they will at most be considered full time for those two months. If an employer is required to continue to provide benefits under the FMLA, then the employer should also be required to continue to count that employee as a full-time employee for purposes of determining whether the employer has a responsibility to provide health insurance.

In the event that a cap is deemed necessary, it should be significantly higher, such as the cap included in the regulations interpreting Employee Retirement Income Security Act ("ERISA"). Like the Notice's proposed approach, ERISA includes in its definition of hours of service, time for which an employee is paid but performed no duties.[1] However, the ERISA regulations require employers to credit employees for all hours of service on account of a single continuous period during which s/he performs no duties up to 501 hours. This higher cap of 501 hours should also be applied to the shared employer responsibility provisions of the ACA, as it is grounded in ERISA – a statute on which the Departments repeatedly rely in the Notice – and it is more consistent with the purposes of the statute.

<u>How Hours of Service Would Be Calculated</u>
(Notice Sec. III(C))

<u>Calculation of hours of service for hourly employees</u>

The Notice proposes that for employees paid on an hourly basis, "the employer will be required to calculate actual hours of service from records of hours worked and hours for which payment is made or due." Notice p. 7. We suggest that the regulations simply provide that an hourly employee's status as a full-time employee be determined by calculating the employee's "actual hours of service." Of course, we understand that employers will use their records in making that calculation. However, specifically stating in the regulations that the determination is based on records would provide employers that underestimate the actual hours of service in their records with a defense that they properly followed the regulations when they under report.

The regulations should also explicitly require employers to maintain complete and accurate records of hours worked, and hours for which payment is made or due, for each employee. Further, the regulations should address the consequences of an employer's failure to maintain such records.

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[1] ERISA regulations provide that an hour of service is (1) "each hour for which an employee is paid or entitled to payment for the performance of duties for the employer" and (2) "each hour for which an employee is paid, or entitled to payment, by the employer on account of a period of time during which no duties are performed . . . due to vacation, holiday, illness, incapacity (including disability), layoff, jury duty, military duty or leave of absence." 29 CFR §2530-200b-2(a)(1) and (2).

The Departments can draw from the regulations interpreting FLSA, which appropriately require that employers maintain accurate records of hours worked. See 29 CFR 516 (2011). In FLSA actions, when an employer's records are inaccurate, incomplete, fraudulent, or non-existent, an employee's evidence of hours worked is accepted and the amount of any FLSA award is "reasonably inferred" from that evidence. See Anderson v. Mt. Clemens Pottery Co., 328 U.S. 680, 687-88 (1946). With respect to ACA §4980H, when an employer fails to maintain complete and accurate records of hours worked and/or hours for which employees are paid or entitled to be paid, other evidence should be accepted for the purpose of calculating hours of service and the employer's calculations should be adjusted accordingly. As under FLSA, an employer should not reap the benefits of improper recordkeeping in the context of the ACA. A regulatory scheme of this nature will create the proper incentive for employers to maintain accurate and complete records, increase the likelihood that covered employers would be accurately identified, and ease enforcement efforts. Moreover, a recordkeeping requirement under the ACA, distinct from that required under FLSA, would enable the regulating agencies under the ACA to assess penalties for an employer's failure to maintain records consistent with that statute's requirements.

Calculation for hours of service for non-hourly employees

The Notice proposes that employers be given the option of choosing one of three methods for calculating the hours of service for non-hourly employees. One such method is the "days-worked equivalency method" pursuant to which a non-hourly employee would be credited with eight (8) hours of service for each day in which s/he would be required to be credited with at least one hour of service. Notice p. 7. We believe the days-worked equivalency method will improperly exclude many actual full-time employees who work longer shifts on fewer days from being deemed full-time employees for the purposes of §4980H. Therefore, this method should not be an option for employers.

Many employees, particularly in the health care industry, work "flex shifts" pursuant to which they work fewer days in a week, but longer hours on the days they do work. For example, many health care employees, including physicians, registered nurses, physicians assistants, and pharmacists, often work 12-hour shifts, three days per week. These employees average 36 hours of service per week and, under the express language of §4980H(c)(4)(A), should be deemed full-time employees. However, under the days-worked equivalency method, these employees would be credited with only eight (8) hours for each of the three days per week that they work, for a total of 24 hours, disqualifying them from status as full-time employees.

The Departments seem to contemplate regulations that would disallow an employer's use of the days-worked equivalency "if the result would be to substantially understate an employee's hours of service in a manner that would cause that employee not to be treated as full-time." Notice p. 8. However, even with that caveat, providing this option to employers while, at the same time, allowing employers to use different methods for different classifications of non-hourly employees (Notice p. 7), creates the potential for manipulation and abuse. At best, it creates additional monitoring and compliance costs for the regulating agencies – costs that can be avoided simply by eliminating the days-worked equivalency method as an option. The weeks-worked equivalency method, on the other hand, will more accurately capture the true number of full-time employees and does not carry the same opportunity for employers to misuse the regulations. Accordingly, we support giving employers the option of using the weeks-worked equivalency method for calculating hours of service.

In the event the Departments determine that the days-worked equivalency method should be included in the regulations, we suggest that rather than credit employees with only eight (8) hours of service per day, it credit employees with ten (10) hours of service, as is the case in the regulations interpreting ERISA.[2] With a ten hour credit, employees who work three 12-hour shifts will be credited with 30 hours per week and, therefore, will be deemed full-time employees. By increasing the days-worked equivalency to ten (10) hours, employers' incentive to game the system by choosing this method to limit the number of full-time employees will be significantly reduced, albeit not entirely eliminated.

Determination of Whether An Employer Is An Applicable Large Employer

Full-Time Employees for Determining Applicable Large Employer Status (Notice Sec. IV(B))

The Notice proposes using the monthly equivalency of 130 hours of service in a calendar month for determining whether an employee is a full-time employee for the purpose of determining an employer's status as an "applicable large employer." For all of the reasons discussed above in connection with Notice Sec. III(C), we believe that this approach is inconsistent with the express language of §4980H and the underlying purposes of the legislation. Accordingly, in the event it is determined that a monthly equivalency is necessary, we suggest using 120 hours of service in a calendar month as that standard will capture all employees who average at least 30 hours of service in *any* month, as required by §4980H(c)(4)(A).

Potential Methods for Determining Full-Time Employees Under §4980H

Look-back/Stability Period Safe Harbor (Notice Sec. V)

The Notice suggests that determining full-time employee status on a monthly basis for the purpose of calculating an employer's potential §4980H liability, "may cause practical difficulties for employers, employees, and the State Exchanges." Notice p. 13. Specifically, the Notice raises concerns about an employer's inability to forecast or avoid potential liability, and the undesirable result that employees will move into and out of employment-based coverage on a monthly basis. Notice p. 13-14. To address these concerns, the Notice proposes giving employers the option of using a look-back/stability period safe harbor pursuant to which each employee's full-time status would be determined by looking back at a defined period between three and twelve consecutive calendar months, as chosen by the employer ("measurement period"), and, if the employee is determined to be a full-time employee during that measurement

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[2] The ERISA regulations dealing with equivalences for determining hours of service provide that for a day of employment, 10 hours of service is credited. 19 CFR §2530.200b-3(3).

period, s/he will be treated as a full-time employee during a subsequent “stability period,” regardless of her actual hours of service during that stability period.

As an initial matter, the notions upon which the look-back/stability period safe harbor construct are premised are not well grounded. First, even with a stability period, an employer will be unable to forecast potential liability. Employer penalties are assessed only when one or more full time employees receives a premium tax credit – and there are many variables that will impact whether an employee is eligible for and applies to receive a premium tax credit. Whether or not an employer offers health insurance, the employer will need to wait to be notified as to whether any employees received a premium tax credit for a specific month before knowing if there is a penalty owed for that particular month. If an employer offers health insurance to its full time employees, the employer will need to wait to be notified of how many employees received a premium tax credit before calculating the amount of the penalty owed.

Second, it is unlikely that employees will move into and out of employer based coverage on a regular basis because employers are unlikely, for plan administration reasons, to move employees into and out of coverage month-to-month. SEIU represents workers in industries, such as home health care, that can have significant variance in hours worked by an employee month to month. The multiemployer plans providing health benefits to these workers generally create eligibility rules that provide multiple months of stability.

Finally, a longer measurement period is not necessary for employers to plan for §4980H liability as the employers determine for themselves whether and when to hire employees and how many hours per week those employees work. Accordingly, employers are able to, and should be expected to, factor potential §4980H liability into those decisions, as they do with respect to payroll taxes, unemployment insurance premiums, and all other costs associated with employing people.

As the Notice overstates the potential difficulties of a month-to-month determination, we believe the benefits of a safe harbor provision are significantly outweighed by the costs, the most significant of which is that a safe harbor paradigm produces an inaccurate assessment of an employer’s liability. Employers are required to pay a penalty based on a month in which an employee receives a premium tax credit in the Exchange. It seems contrary to the law to use a calculation based on hours worked during one time period to determine whether a penalty should be paid for an employee’s receipt of premium tax credits in a different time period.

The potential for employer abuse and manipulation, and the resulting need for additional monitoring and enforcement efforts by the regulating agencies, is another cost of a safe harbor provision. Under the proposed stability period, employers would be incentivized to select measurement periods that minimize liability. For example, an employer that has a reduced workforce for three months each year may use a look-back/stability periods of three months in order to only have significant penalties for six months out of every year. For example, imagine Employer A does not offer health insurance benefits and has 100 full time employees in the first two quarters of the year, 25 full time employees in the third quarter of the year, and 100 full time employees in the fourth quarter of the year. If Employer A uses a three month look back/stability period based on each quarter, then Employer A will pay no penalty for the third or fourth quarter because of the reasons listed below.

- Employer A employs only 25 of the 100 full-time employees in the third quarter. Since the proposed method in the Notice states that only employees that remain employees are counted as full-time employees in the stability period, Employer A is determined to have 25 full-time employees in the third quarter. Employer A pays no penalty because no penalty is assessed on the first 30 full-time employees.

- Employer A employs 100 full-time employees in the fourth quarter, but only 25 of those employees were full-time employees in the third quarter. Therefore, Employer A is able to use the stability period to be determined to have 25 full-time employees in the fourth quarter and again has no penalty.

As the Notice correctly observes, allowing employers to use different measurement and stability periods for different portions of the workforce creates even greater potential for employer manipulation and would require significant additional resources to review and confirm employer compliance.

Finally, a safe harbor provision that allows employers to wait for as long as twelve months before paying an assessment on a particular employee is inconsistent with the proposed 90-day waiting period (see Notice p. 16). If an employer must offer a full-time employee health insurance within 90 days, it should not be entitled to wait up to one year to pay the assessment on that employee if it chooses not to offer health coverage.

For all these reasons, we believe a look-back/stability period safe harbor is both unnecessary and inappropriate for the purpose of calculating an applicable large employer's assessable payment.

However, we recognize that there need to be some adjustments made for when an employee's hours shift temporarily without a real change in employment status. This is important not only for employers' ability to project liability but also to avoid impeding necessary flexibility important to employers and employees. One example is if a clinic allows employees to find other employees to fill shifts if they are unable to make it to work. A nurse that works two 12 hour shifts a week may one month work over an average of 30 hours a week by taking on additional shifts of a coworker who is out ill. The nurses currently enjoy the flexibility of being allowed to find people to fill shifts when necessary. If the employer were assessed a penalty for a traditionally part-time nurse working over 30 hours in one month, the employer may no longer allow the flexibility which will make it more difficult for the nurses to take time off work when necessary.

Another example is the often fluctuating hours of home care workers employed by home care agencies. The hours of a home care worker can drop significantly in one month because of something outside of the worker's or the agency's control – such as the hospitalization or death of a client. If a home care worker is working 40 hours a week with two regular clients and one of those clients goes into the hospital for a number of weeks, the nursing home worker may drop down to under 30 hours a week for one month. This worker has not really become a part-time worker as she will resume her normal hours when the client returns home or a new client is assigned.

We believe it is possible to create a system in which the determination of whether an employee is full-time is made in the same month that the employer may be assessed a penalty for a full-time employee that receives a premium tax credit. Such a system could look at each month but make an adjustment if a worker has changes in hours for a short period of time, such as for just one or two months. However, in order to be consistent with the 90-day waiting period limitation, in no instance should an employee be considered part-time if the employee is working for 30 hours or more per week for more than 90 continuous days. If the actual penalty is paid once a quarter or once a year, there is no reason why employers would not be able to follow such a system.

In creating the system, attention should be given to industries which employ significantly fewer employees or reduce the hours of many employees during certain months of the year. For example, employers in educational settings generally employ far fewer full-time employees during the summer months, and any provision for determining full-time employee status should account for that employment model in a way that accurately counts the number of full-time employees.

General Request for Comments

Comments Requested On Whether There Are Appropriate Exceptions (Notice Sec. VI(A))

The Notice requests comments as to “whether there are appropriate exceptions that should be provided for under the employer responsibility provisions. Notice p. 18. There should not be any exceptions made for employees that are otherwise full-time employees. Employers who employ large numbers of employees that fit exceptions will be more likely not to offer insurance because there will be no penalty. Some of these employees will remain uninsured, while others will receive premium tax credits without the employer paying a penalty for not offering coverage. Employers may also find hiring employees that fit the exceptions to be an economic advantage because of the lack of requirement to offer health insurance. This will create distortions in the labor market.

90-Day Waiting Period Limitation

Employer Sponsored Plans (Notice Sec. VI(B))

When an employer sponsors the group health plan, the employer has control over, and real-time knowledge of, both the hours worked and the benefits provided. With this control, the employer should have no need to have any exemptions from the 90-day waiting period limitation. Exemptions for certain eligibility processes will encourage employers to transition to the eligibility process that will allow for the largest delay in provision of benefits and therefore undermine the intent of the law. Specific exemptions raised in the Notice are discussed below related to situations in which an employer sponsors the group health plan.

If an employer sponsored plan uses a “look-back measurement period,” as described on page 20 of the Notice, that prevents enrollment within the 90-day waiting period limitation, then the employer sponsored plan should be required to change the eligibility process in the same way that an employer sponsored plan that currently has a 12 month waiting period will have to change the eligibility process.

If an employer currently has a 90-day service requirement and the plan or issuer does not allow mid-month enrollment, as described on page 21 of the Notice, the employer should be required to reduce the current service requirement to allow employees to be enrolled within the 90-day waiting period limitation. This could be achieved simply be reducing the 90-day service requirement to a 60-day service requirement. This situation should be no different than an employer having to reduce a 120-day service requirement.

The Notice also raises the issue that some plans and issuers only allow enrollment on the first day of a quarter. If all employer-sponsored health plans face the 90-day waiting period limitation, then plans and issuers will change policies to allow enrollment on the first day of the month. No exception is necessary.

The 90-day waiting period should not begin after a “probationary” period as described on page 21 of the Notice. If the regulations allow an employer to delay the beginning of health benefits to after the end of a “probationary” period, then “probationary” periods will begin to be used as a method of circumventing the 90-day waiting period limitation. An employer will be able to institute a 12 month “probationary” period and employees could end up waiting for 455 days to enroll in health benefits.

Multiemployer Sponsored Plans Providing Coverage Under a Collectively Bargained Agreement
(Notice Sec. VI(B))

Multiemployer plans providing coverage under a collectively bargained agreement operate under different situations and certain exceptions need to apply. We understand other groups have provided comments related to multiemployer plans, but wanted to raise some issues specific to industries represented by SEIU.

Two important differences between employer sponsored group health plans and multiemployer health plans are that employers have control over, and knowledge of, the hours worked and records of hours worked while multiemployers plans do not. Multiemployer plans usually – although not always – rely upon employer reports of hours worked accompanying contribution payments. Contribution payments are usually based on hours worked or wages earned for a prior period. For example, an employer may make a contribution equal to a set amount for each hour worked by every employee covered by the collective bargaining agreement or may contribute a specified percentage of total wages earned. The multiemployer plan must then use the report of hours worked to determine who is eligible for the benefits. As a result, multiemployer plans are often unable to calculate eligibility until weeks or even months after hours are worked. The rules must have flexibility in how they apply to multiemployer plans in order to address this delay.

The only way some plans will be able to shorten the waiting period is to change the enrollment process in a way that negatively impacts the workers. Plans would either have to (1) automatically enroll all eligible workers without providing an opportunity to opt-out of coverage until after enrollment or (2) provide an opportunity to opt-out of coverage to all new workers whether or not the workers will actually be eligible for coverage. Both of these options would cause negative effects on low wage workers. Many multiemployer plans provide coverage with no employee contribution, but this is not the case in all situations. Some collective bargaining agreements require an employee contribution for coverage. Automatic enrollment prior to an opportunity to opt-out of coverage would mean some workers would have the employee portion of the health benefit contribution deducted from their paychecks unexpectedly – even if the workers want to opt-out of coverage. For a worker living paycheck to paycheck, even a small unexpected payroll deduction could result in a serious financial difficulty. Alternatively, multiemployer plans would need to reach out to all new workers and have them choose whether or not to opt-out prior to knowing who is eligible. This would mean workers who will never become eligible will receive the opt-out information. This could create confusion as some workers may believe they have coverage because they chose not to opt-out. As a result, these workers may remain uninsured rather than enroll in other available coverage options, such as Medicaid or an insurance Exchange.

Thus we believe that there needs to be an allowance for the delay in multiemployer plans receiving the hours worked data necessary to determine eligibility.

Importantly, the above exception should apply only where a multiemployer plan relies on employer reports of hours worked after the fact to determine eligibility. There are some multiemployer plans that, even when providing coverage under a collectively bargained agreement, should be treated the same as an employer sponsored plan for purposes of the 90-day waiting period limitation. These are multiemployer plans that charge a monthly fee to the employers for each employee enrolled, much in the same way an issuer charges a monthly premium for each employee enrolled. In these situations, the employer has the same control over the eligibility determination that the employer has in an employer-sponsored plan. There is no need for a separate process and employers should not be allowed to use the existence of a collectively bargained agreement and a multiemployer plan to try and delay the start of employees' health benefits.

We thank you again for the opportunity to provide comments on these important provisions of the Affordable Care Act.

Sincerely,

Carol Golubock
Director of Policy

Dania Palanker
Associate Director of Healthcare Policy

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Re: Technical Release 2012-01

Request for Comments on Frequently-Asked-Questions Regarding Automatic Enrollment, Employer Shared Responsibility, and Waiting Periods (Technical Release 2012-01)

To Whom It May Concern:

We submit this letter in response to Technical Release 2012-10 ("Release"), requesting comments on various approaches for interpreting the provisions of §4980H of the Affordable Care Act ("ACA") governing automatic enrollment, employer shared responsibility, and the 90-day limitation on waiting periods. We thank you for the opportunity to participate in the process of developing regulatory guidance regarding these critical provisions of the ACA.

The Service Employees International Union ("SEIU") represents 2.1 million workers, advocating to improve their lives and the services they provide. SEIU is the largest healthcare union with more than 1.1 members in the field, including nurses, LPNs, doctors, lab technicians, nursing home workers, and home care providers. As the largest property services union, SEIU represents 225,000 members in the building cleaning and security industries, including janitors, security officers, superintendents, maintenance workers, window cleaners, and doormen and women. With more than 1 million local and state government workers, public school employees, bus drivers, and child care providers, SEIU is the second largest public services union. Our members receive employment based health benefits through multi-employer plans, government plans and employer-sponsored plans, but many workers in these industries, especially low-wage workers, do not have employer-sponsored coverage.

As one of the strongest advocates for passage of health reform, SEIU has a deep interest in the successful implementation the ACA in a manner that is consistent with the legislative goal of expanding coverage by building off of, rather than replacing, employment-based health insurance. We hope the following comments will help guide the Departments of Labor, Health and Human Services, and the Treasury (collectively "the Departments") in developing regulations that promote that legislative goal, resulting in expanded, affordable health coverage for millions of working people.

Question 1: Automatic Enrollment: Timeline for issuing guidance
The Release indicates that the Department of Labor has concluded that its automatic enrollment guidance will not be ready to take effect by 2014.

We would like to underscore the importance of having automatic enrollment regulations in place before 2014. The goal of the ACA is to increase coverage and the automatic enrollment requirement is an important tool to encourage maximum utilization of employer-based coverage. Failure to include an automatic enrollment requirement for employers as we transition to the reformed system may result in employer-based coverage rates much lower than expected, thereby substantially undercutting the impact of healthcare reform. In addition, more consumers may find themselves liable for the individual responsibility penalty even if they have a valid offer of employer-sponsored coverage. It will also be much easier to ensure coordination with other critical components of the ACA related to employer responsibility if automatic enrollment is implemented at the same time other requirements are implemented. While we recognize that there are sectors and situations where automatic enrollment carries special challenges, we strongly encourage the Department to release final regulations on automatic enrollment in time to take effect by 2014.

Question 2: Permitting employers to use an employee's W-2 wages as a "safe harbor" in determining the affordability of employer coverage, as outlined in IRS Notice 2011-73

We support the use of an affordability safe harbor to protect employers from being penalized when an employee's household income is lower than the wages the employer has paid to the employee. However, as described in our comments on Notice 2011-73, provisions must be put in place to ensure the safe harbor does not become a tax loophole allowing employers to offer unaffordable coverage without paying the assessment.

While outside the scope of the Release, we reiterate that, even with family coverage excluded from the safe harbor as described in our comments on Notice 2011-73, under the proposed test for affordability of family coverage as described in REG 1131491-10, thousands of dependents of low-wage employees will not be able to access premium tax credits despite the fact that the cost of employer-sponsored family coverage exceeds 9.5% of their family income.

Question 4: Use of a look-back/stability period safe harbor, based on the approach outlined in IRS Notice 2011-36
As described in our previously submitted comments on Notice 2011-36, we believe a look-back/stability period safe harbor is unnecessary and inappropriate for the purpose of calculating an applicable large employer's assessable payment. The system creates an inaccurate assessment of an employer's liability and is ripe for employer abuse and manipulation, particularly in industries with high turnover or where there are fluctuations in employee hours.

For these reasons, we urge the Departments to reconsider permitting the use of a look-back/stability approach. However, if the Departments choose to issue proposed regulations or other guidance that allows employers to use a look-back/stability period safe harbor, we strongly encourage the Departments to:

- Limit the length of the look-back periods for current employees; no measurement period should exceed ninety days;
- Require uniform application of the periods across classifications;
- Prohibit employers from changing the length or scheduling of measurement periods;

- Add robust monitoring and enforcement mechanisms; this should include a clear and enforceable process for redress in cases where employees believe their status has been wrongly categorized.

Particular attention should be paid to settings where employees' hours vary over the course of the year.

Question 5: Determining full-time status of a newly-hired employee
The Departments propose a system where, in some circumstances, employers would have up to six months to determine the full- or part-time status of a new employee (two three-month periods). This system creates an incentive for employers to manipulate scheduling in order to avoid the 4980H penalty. We recommend the Departments:

- Eliminate the option of a second three month period to determine status for new hires. If the Departments choose to maintain this option, the conditions under which an employer may apply it must be narrowed to ensure it is not used to prolong evasion of the penalty when workers are working full-time.

Finally, the Release states "it is anticipated that the guidance will allow look-back and stability periods not exceeding 12 months." This language is unclear. It is not clear whether the stability periods together may total 12 months or less or *each* may be 12 months long. We encourage the Departments to clarify this language and, as noted above, limit the length of the measurement periods.

We thank you again for the opportunity to provide comments on these important provisions of the Affordable Care Act.

Sincerely,

Carol Golubock
Director of Policy

Amy Adams
Coordinator, Healthcare Policy