

**From:** [Ray Scannell](#)  
**To:** [Baum, Beth - EBSA](#)  
**Subject:** Comment  
**Date:** Thursday, October 04, 2012 10:21:40 AM  
**Attachments:** [BCTGM Statement revised re Health Care implemntation.docx](#)

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**Beth,**

**Got your message and thank you for the information. Attached are our comments, but based on yesterday's discussion at Treasury I want to emphasize two things:**

**1) "Seasonal" work in all industries is not necessarily characterized by summer employment (I believe the analogy used was life guards). In several of our industries (Sugar beet processing, tobacco leaf processing and candy/confectionery manufacturing "seasonal work is actually full time factory work that happens to peak at various times of the year (depending on the industry). While the legislation may have contemplated excluding summer life guards, I don't think it contemplated the types of alternative "seasonal" work our members experience....**

**2) In many of our core industries (e.g., baking, milling) full time employment is under assault. Many employers, if they had their way, would reduce full time employment to part-time employment. I don't think the intent of the legislation was to provide an incentive to employers to evade union contracts (which compel full time work) or to reward non-union employers who game the system to evade full time work.**

**Thanks. We commented on point 1 in the attached; point 2 came up yesterday and concerns us greatly in light of the struggles underway.**

<<BCTGM Statement revised re Health Care implemntation.docx>>

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*"I do not view the labor movement as part of the problem. To me, it's part of the solution. You cannot have a strong middle class without a strong labor movement."*

*President Barack Obama*

Submitted via e-mail to  
[Notice.comments@irscounsel.treas.gov](mailto:Notice.comments@irscounsel.treas.gov)  
[e-ohpsca-er.ebsa@dol.gov](mailto:e-ohpsca-er.ebsa@dol.gov)

October 1, 2012

CC:PA:LPD:PR (Notice 2012-58)  
Room 5203  
Internal Revenue Service  
P.O. Box 7604  
Ben Franklin Station  
Washington, DC 20044

Office of Health Plan Standards  
and Compliance Assistance  
Employee Benefit Security Administration  
Room N-5653  
U.S. Department of Labor  
200 Constitution Avenue, NW  
Washington, DC 20210

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

Technical Release 2012-02—Guidance on 90-Day Waiting Period Limitation  
under Public Health Service Act § 2708

Ladies and Gentlemen:

These comments on Notice 2012-58, issued by the Department of Treasury and the Internal Revenue Service (“Treasury”), and Technical Release 2012-02, issued by the Department of Labor (“DOL”), are submitted on behalf of the Bakery, Confectionery, Tobacco Workers and Grain Miller International Union (BCTGM). The BCTGM represents more than 90,000 workers across the US, primarily in mentioned industries in the private sector. We specifically represent workers in three sectors where “seasonal” work is common: Sugar beet processing, tobacco leaf processing and candy and confectionery manufacturing. Our affiliated local unions negotiate health care benefits for workers, retirees and their family members, and these benefits are provided through single employer and multiemployer plans, both insured and self-funded.

We write in support of the comments solicited in response to Notice 2012-58 by the AFL-CIO sent via email on October 1. We too are concerned  
*“that the approaches detailed in Notice 2012-58 limit the number of workers considered to be full-time employees, as well as invite employer manipulation to avoid either providing affordable health care coverage or being assessed a penalty under Section 4980H.”*

Our comments focus specifically on this question posed at the end of the notice:

Among the specific issues currently under consideration with respect to the identification of full-time employees under § 4980H are the following:

(4) How the term “seasonal worker” should be defined under § 4980H....

In three BCTGM industries (sugar beet processing, tobacco leaf processing and candy/confectionery manufacturing) a certain, varying percentage of the workforce is employed full time (40 hours per week PLUS overtime) for part of the calendar year. When these employees work, they work a full time schedule, PLUS overtime, and are recognized as subject to the provisions of the wage and hour, labor and other applicable laws. The period of full time PLUS employment can range from at least five months to nine months. The percentage of the workforce employed for part of the year (or “season”) ranges from a majority (tobacco leaf processing) to a minority (e.g., sugar beet processing). Their employers all easily attain “large employer status.” They are, in union shops, covered under collective agreements in various statuses. The length of their full time status is dependent on the volume of the crop harvested and/or the demand for their products (for example whether the market for the candy/confections produced in a specific company includes Valentine’s Day, Easter, Halloween, and/or Christmas). They are manufacturing workers in every sense of the word, and should NOT be considered “seasonal workers” under the definition applied to agricultural labor.

In light of the purposes of the act, these “seasonal” manufacturing workers should be considered to have the same standing as regular “year round” manufacturing workers. This might not be possible if the expanded safe harbor Notice 2011-58 contemplates for determining whether newly hired “variable hour” or “seasonal” employees are full-time employees for purposes of Code Section 4980H. We agree that:

*“Notice 2011-58 unfortunately moves in the wrong direction by allowing measurement periods up to 12 months. This approach virtually assures that any seasonal employee will never be considered a full-time worker, and the same result is more likely for a variable hour employee as the employer is in complete control of scheduling during the measurement period. The safe harbor, in our view, undermines any meaningful employer responsibility requirement and encourages employers to categorize workers as “variable hour” employees. And, those employers providing health care coverage as required by their collective bargaining agreements will continue to be disadvantaged compared to their competitors who can take full advantage of the opportunities to minimize the number of employees considered to be full-time under the law.”*

We also agree that:

*In keeping with the statutory requirements and the underlying purposes of the employer responsibility provision, it is our view that Treasury should not allow employers to use the safe harbor to determine the full-time status of employees regularly hired for limited periods of time, including employees considered “seasonal employees”, if they are in*

*positions where the weekly work hours have traditionally exceeded 30 hours per week.<sup>1</sup>  
Instead, those employees should be treated as full-time at their start date.*

We concur as well with the relevant recommendations made by the AFL-CIO.

We much appreciate the opportunity to provide comments in response to Notice 2012-48 and Technical Release 2012-02 and we urge Treasury and DOL to incorporate our suggestions and those of the AFL-CIO in any proposed rule or other guidance to be issued.

Sincerely,

Frank Hurt  
International President

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<sup>1</sup> From our perspective, the label applied to these employees—seasonal, short-term assignment or project—should make no difference. If they are expected to earn more than 30 hours of service in a week for the term of their employment, these employees are full-time employees.