

**U. S. Department of Labor
Employee Benefits Security Administration
Public Forum:
Automatic Enrollment in Large Employer Health Plans**

**April 8, 2011
1:00 pm ET**

Michael Davis: Good afternoon. I'm Michael Davis. I'm the Deputy Assistant Secretary for the Employee Benefits Security Administration.

I first of all want to extend regrets for Phyllis Borzi, who extends her regards. Just, as you know, a typical day here in Washington. She is actually working on some plans, just in case. So she will try and get here today if she can. She certainly would like to come and say hello, spend as much time here as she can.

But I would like to welcome you to the Department of Labor and the Employee Benefits Security Administration's Public Forum on Automatic Enrollment in Large Employer Health Plans.

Section 1511 of the Patient Protection and Affordable Care Act amended Section 18A of the Fair Labor Standards Act to require an employer, to which the FLSA applies and who has more than 200 full-time employees, to automatically enroll new full-time employees in one of the employer's health benefits plan, subject to any waiting period authorized by law, and to continue

the enrollment of current employees on the health benefits plan offered through the employer.

Section 18A further requires adequate notice and the opportunity for an employee to opt-out of any coverage in which the employee was automatically enrolled.

Any applicable state laws regarding payroll such as permissible deductions of wages will continue to be in affect except to the extent that state laws prohibit employers from implementing automatic enrollment under the FLSA provisions.

You can find all of our guidance on this and other Affordable Care Act issues on the EBSA Web site found at www.dol.gov/ebsa/healthreform.

This public forum is meant to provide a guided conversation that we hope will generate a productive and informative exchange of ideas about these new health plan automatic enrollment provisions.

The forum will feature three panels: Panel 1, definition of full-time employee for purposes of the automatic enrollment provisions of Section 18A of the FLSA.

Panel 2, selection of plan benefit package and coverage if employer maintains more than one, in which employees would be automatically enrolled for purposes of the automatic enrollment provisions of Section 18A of the FLSA.

Panel 3, the adequate notice and opportunity to opt-out requirements under the automatic enrollment provisions of Section 18A of the FLSA.

In response to our invitation for today's forum, there are 38 stakeholders registered to participate in person, and over 130 stakeholders registered to participate by telephone.

The panelists we have chosen represent a cross-section of interested persons. We will introduce them individually at the beginning of each panel.

While the focus of this forum is on the Department of Labor's implementation of the automatic enrollment provisions of the FLSA, we are coordinating our efforts with the Department of the Treasury and the Department of Health and Human Services because we share responsibility for implementation of the Affordable Care Act.

Specifically, we are aware of the need to coordinate the automatic enrollment guidance with the three-agency guidance regarding the 90-day waiting period and the Treasury guidance regarding the employer responsibility provision.

In that regard, we have several of our colleagues in attendance today from the Departments of Health and Human Services, and Treasury and the IRS, including Mark Iwry, Yvette Fontenot -- great to have you here -- Lisa Campbell, Robert Imes, Kevin Knopf, Karen Levin, Tricia McDermott, Lisa Mojiri-Azad, Helen Morrison, Cam Moultrie, Russ Weinheimer, Naomi Senkeeto, and Carrie Simons.

I'd like to thank...did I leave anybody out? I named everybody here.

I'd like to thank all of the EBSA staff who worked so hard to make this public forum happen, especially Janet Walters and June Solonsky of the Office of Regulations and Interpretations.

And thanks to all of you for coming today as well, and for participating in this forum.

Now a few housekeeping matters: each of our panels will run for approximately one hour. During the first 40 minutes of each panel the moderator will ask the panelist questions. At the end of each panel dialogue we will open up the last 20 minutes of each panel for audience participation.

Phone attendees will be instructed by the operator on how to line up by phone and make remarks. We will alternate taking remarks between the in person attendees and the telephone attendees.

We will take a 15 minute break after the second panel. This forum is being recorded and the transcript of today's session will be available on EBSA's Web site.

And now the conference operator will provide further instructions.

Coordinator: If you have a question on today's conference you may press star 1 on your touchtone phone and record your name and your organization at the prompt.

You'll need to unmute your phone. And once again that's star 1 if you have a question and record your name and organization at the prompt.

Michael Davis: Before we turn it over Dan Maguire from our Office of Health Plan Standards and Compliance Assistance, who is going to moderate the first panel, Mark Iwry from Treasury wanted to make a [few remarks].

Mark Iwry: Thanks Michael. Just briefly in response to the questions that people have asked, it may be helpful to add a word about our process on the related provision building on, Michael, what you just said about coordination.

As you know, Congress enacted the automatic enrollment provisions of the ACA as an amendment to the Fair Labor Standards Act, assigning Labor the responsibility for interpreting and applying those provisions. That's why this forum is being held by the Department of Labor.

One of the key issues that arises in the context of this auto-enrollment provision is exactly how the full-time employees, which are the ones who are required to be automatically enrolled as you know, are going to be defined.

How full-time employees are defined is also a key aspect of the employer responsibility provisions relating to the offering of employer coverage. Those are the provisions that impose a requirement on employers to offer coverage. If they fail to offer coverage, there is this payment. If they offer coverage, but fail to offer affordable coverage to their full-time employees and at least one of them gets a premium credit for coverage on an Exchange, then there is another assessable payment.

And those ACA provisions, the employer responsibility ones, as you know, amend the tax code. So the legislation assigns the Treasury and IRS the responsibility to interpret and apply those provisions.

And in much the same way that, as Michael was saying, Treasury and the Service have worked closely with DOL and with HHS on many of the market reform regulations and provisions of the legislation which have been enacted as amendments to all three statutes for which the three Departments are responsible. Here, Labor and Treasury will also be working closely in the

same spirit to coordinate our respective guidance on the employer responsibility provisions -- in the case of Treasury -- relating the offering of coverage, and the automatic enrollment provisions in the case of Labor.

And we'll give special attention in that coordination to the fact that the concept of full-time employee, which is integral to both the auto-enrollment and the employer responsibility provisions, involves different statutory language in the two sets of provisions. Our coordination efforts are taking that into account.

We'll also continue to work closely on the provisions that intersect with these; Michael had mentioned the 90-day waiting period limitation on which all three Departments share interpretive jurisdiction.

Treasury and the IRS have been working on a notice that would invite comments on selected issues under the employer responsibility provisions to offer coverage provisions in the tax code, relating in particular to the definition of full-time employee, as well as some of the other aspects of those provisions.

We expect that the notice would also invite comments on behalf of all three Departments, invite comments on the interaction between those provisions, and the 90-day waiting period limitation - Michael.

Michael Davis: Thanks Mark. As I mentioned, Dan Maguire is head of our Office of Health Plan Standards and Compliance Assistance. He is going to moderate the first panel. He is going to briefly introduce our first group of panelists and we'll get right into the topics - Dan.

Dan Maguire: Okay. Thank you Michael. All right. Good afternoon everyone. We're going to go through this exercise and hopefully we all here will learn a lot.

Principally we are here to listen and have sort of a guided discussion. Many times in these panels and in these circumstances, people are always interested in trying to get more guidance from government people.

And for us, it's a tricky proposition since we, you know, are in the business of providing guidance sometime after we've done a rulemaking and so forth.

So, many times we'll be asking questions and more or less trying to seek your advice and your guidance on some of these things, and we may refrain from attempting to give early answers or early guidance since many times it might lead you astray and perhaps be bad information in the long run.

So, with that out of the way, we'll go into the first panel, which is a discussion of and the definition of full-time employee for the purposes of the automatic enrollment provisions of Section 18A of the Fair Labor Standards Act.

So, to discuss our issues under that panel today first we have Amy Bergner, who is an attorney and a partner in Mercer's Washington Resource Group.

We also have Ashley Gillihan, who is Council of Alston & Bird. And, we have Erik Lieberman from the Regulatory Council for Food Marketing Institute. And, we have Manny Pastreich, the State Deputy Director of Collective Bargaining for Local 32 BJSEIU.

So, what we will do now is I'll read the first point that folks are going to discuss, which happens to be in terms of trying to stimulate this discussion on

the full-time employee definition: What standards should be developed for a definition of full-time employee?

Would a “look back standard” or a “reasonably expects standard” work for an employer who does not know prospectively how many hours new employees will work?

Or, over what time period should the number of hours calculate; weekly, quarterly, et cetera?

So Manny, who would like to go first? Amy?

Manny Pastreich: I'll jump in first.

Dan Maguire: Okay.

Manny Pastreich: So, when I was thinking about this question the other day (inaudible) I'll first start on concepts and principles in my mind and then I'll try and get more specific for you.

But, the first one is we obviously want to encourage quality healthcare coverage. That should be the guiding principle.

And I think, when I think about this and my experience with our members, that automatic enrollment actually would encourage people to sign up for plans. People who might not otherwise, may have been discouraged by their employer or lack of information. So, I think the concept is a good one.

Second, it should be good coverage. Not all coverage is equal and some is probably inadequate and we shouldn't be signing people up for poor coverage.

So, I don't know whether you've got to look at actuarial value of the plans or not. It's something that -- would not enroll people in that plan.

The third, which is somewhat obvious, but automatic enrollment and eligibility are tied together. It basically puts sides at the same point. And so, whatever rules there are should be clear, consistent, allow individuals, companies, benefits plans to know what's coming before they are hired, before they lose coverage, before they are enrolled in coverage so that they can plan.

And the last concept is we should allow individuals to make good choices. An example that came to mind when we were thinking about this is if I'm eligible for a subsidy, or very likely to be eligible for a subsidy on the Exchange, they may be better off with the Exchange.

Should I be automatically enrolled in the company plan where I may be worse off? Maybe I shouldn't be automatically enrolled, or maybe at a minimum I should be directed to the disclosure that I have other options.

So then, when I think about what standards you should use, I guess the words you have in your question I think are pretty good, because I think the "reasonably expect standard" looking forward is good.

Whatever your standard is, whether it's 30 hours or something else, if I'm hired and someone thinks I'm going to work 30 hours, I probably should be automatically enrolled as a first point.

But I think there should be a look back system as well. I think there should be both.

We've seen plenty of cases where our members work 28 or 29 hours, or are scheduled for 28 or 29 hours when the eligibility is 30 hours.

But when you look back over the time period -- over weeks, months or quarters -- they probably ended up working, especially when you take paid time off into account, more than those 30 hours. So I think that is something we should look at.

Dan Maguire: All right, thank you. Amy.

Amy Bergner: Sure. Well I think following on Manny's idea of starting with some broad concepts and principles. I call it, call it kind of the three [T's]: flexibility, [certainty], and workability for employers.

On flexibility, you know, I think employers and employees come in all different sizes and shapes in industries and they need flexibility to design plans for their work forces and for their industry.

And I think this law and ERISA -- neither of those laws require group health plans or would require employers to provide group health plan coverage. Nor do they contain eligibility or participation standards unlike retirement plans.

And I think that's a really key point to remember. That enrollment is available to people who are eligible for plans. But this statutory provision does not require employers to make employees eligible for plans.

In terms of certainty, I think that -- with the ambitious effective dates and as a first wave of market reforms from health insurance -- that employers tried very hard to comply.

And I know you all work very hard to put out guidance. But it was -- it's been a challenge for, I think on both sides, to try to keep up and adjust planning and designing with sort of a constant flow of guidance.

So, I would recommend that you issue both final guidance and sub-regulatory guidance well in advance of when these rules are going to take effect. Probably a year before the first plan year that has to, that employers will have to comply, because there is a tremendous amount of implementation from many employers.

But in terms of workability, I think most of our clients and others that I have been talking to are very concerned about the administrative burdens of the provision.

And, just to give you some context, we did a survey last spring shortly after the law was enacted and at that time 88% of all employers did not auto-enroll their employees. And 95% of all retailers did not auto-enroll their employees.

So, if that gives you a snapshot of how many employers are going to have to work towards implementing, you know...

Amy Turner: Did you say that was of large employers?

Amy Bergner: No, that was all employers.

And in terms of the specifics around a "reasonably expects standard" or "look back standard," I think most employers would prefer a reasonably expects standard.

You know, it's easier to implement than getting into the mechanics of establishing some kind of look back with tracking hours. And there is a lot of, I think, complications particularly. And one thing we were thinking about is that employers, particularly those with high turnovers, by the time you implement a reasonable look back period of you know, whatever it is, whether it's a quarter or a half year of consecutive work, that looking back many employees may already have left employment. And so there is not really meaning to having auto-enrollment at that point.

Dan Maguire: Actually we have heard, you know, some of those comments fairly routinely. Particularly, the need for a decent amount of time to implement and also the sort of effort that it's going to take for people to get up to speed and to implement it, as well as the high turnover situations. So, Ashley.

Ashley Gillihan: I'm grinning to some extent because it's nice when somebody I know and respect goes ahead of me and has a very similar view.

I'm going to follow up on Amy's comment and focus a little bit on the flexibility and certainty. I think at this stage of the implementation of the ACA that is one of the most valuable commodities that an employer plan sponsor, on whose behalf I am here, most valuable commodity that plan sponsors can have.

And I think the one way to allow or to give employers that flexibility and certainty is to allow them to define full-time employee in a way that they have done for many years when they have chosen to cover full-time employees.

I find it very interesting that Congress added this law to the Fair Labor Standards Act, which does not have a definition of full-time employee, nor did

they add a general definition as they did in the employer shared responsibility reform.

And I think that helps. I think that says were going to intersect this employment law with a benefit plan law -- or benefit plan operations. Benefit plans that have been dealing with this issue for many years. And we'll give them some flexibility on how they define that.

So, I would not go as far as to say we must have a reasonable expectation standard or even a look back.

I think either of those would be a good design if an employer chose to so adopt either of those. And again, I think we have to look at this from two different parts as well.

There is also the rule that applies to employers -- which employers are going to be subject to this rule. Which of those had more than 200 full-time employees? I think a look back period would be good in that -- if determined once a year.

Much like we do in the COBRA world where we look back to the preceding year, perhaps we say on average 200 or more full-time employees this will apply to you. The definition of full-time employee in that context would, of course, be the same as we use to determine which employees are eligible or subject to this rule.

And again, I would just reiterate, I think flexibility is important, and the way we give flexibility is to let employers define that according to their reasonable policies and procedures and the plan terms, which we've done for many [years].

Erik Lieberman: Thank you. First I want to thank the Department for inviting us to participate in the panel and we appreciate it.

Our industry -- I'm representing the Food Marketing Institute today-- we represent the supermarket industry and our industry employees are really in large number part-time workers. And, we have many seasonal employees and many, many student employees. For many folks this is the first place where they get a job and we don't want to have a definition of full-time employee that captures these workers. I know the Department of Labor is coordinating with the other agencies in terms of implementing the other provisions of the ACA and to build on Ashley's comments about the flexibility, I don't think the Department should be wedded to the 30 hour shared responsibility benchmark. You know, based on speaking with our members, that does not reflect the hours that they consider a full-time employee to work.

So, I think that the Department really should consider that - I mean, speaking with our members, you're talking 35, 36 hours per week or more. So I think that's something that the Department really needs to consider.

If you implement a look back period, I think you need a minimum of a quarterly period. And if you have -- if you have, well, [employers, first they] should be able to drop coverage of individuals whose hours fall below 30 hours.

And if you have a "reasonably expect standard," you have to give employers enough flexibility so that it functions properly and encompasses what truly are full-time employees.

Dan Maguire: You know, I think we have heard, obviously, many of these comments. The area of high- turnover seasonal employees and so forth, present, obviously, the biggest challenges.

So, if anyone has great ideas on how to effectuate this, we're always glad to have them.

And, as Mark said, you can probably look for future invitations to send us comments and ideas on these issues because, obviously, there is a large segment of the economy that works in retail and food and other, you know, high turnover industries that really do present the most difficult administrative problems on these issues.

So, obviously, any guidance or rules in this area are going to have to try to take all of these different circumstances into consideration. So, we're always glad to receive solutions to the problem.

Okay. With that, we can actually move right into our next issue, which is trying to figure out if anyone has thoughts on solving that most difficult part at the moment, which is the seasonal workers or the temporary workers, et cetera.

So do you want to start?

Ashley Gillihan: Sure, I'd be glad to. Again I would go back to what I said earlier. I think the same concept would apply to seasonal employees, temporary workers, intern student workers.

There are very many classifications [of] employers that may reflect the same general type of temporary or seasonal workers.

And I think we fail to give the flexibility needed in order to accurately and properly administer plans in conjunction with this rule if we try to set some standards on that, other than how they have defined that for years, when they've chosen to cover full-time employees have excluded certain ones.

So, I would propose you give employers the flexibility to define that according to their policy.

Dan Maguire: It would be the "maximum flexibility rule."

Ashley Gillihan: I'm the guy that came up with the "maximum flexibility rule" -- that will be the new term. But I think it sounds, on its face, as though it gives employers carte blanche to do whatever they like.

But you have to keep in mind this is a term -- a "full-time employee" -- is a term that we've been dealing with for many years. If employers have chosen to cover full-time employees, they have had a definition and employees have had a right of action when they felt like they should have been covered under the plan according to that definition.

And, employers have been held to the task to prove that, "Hey, Ashley is not a full-time employee; that's why we didn't let him in." And likewise here, when Ashley says, "I should have been auto-enrolled; I'm a full-time employee," that same thing exists, and that has worked pretty well, I think. It's a reason why we don't have that definition in ERISA today, as Amy mentioned, and why we don't have it in the Fair Labor Standards Act. Also, very telling, we added it to that section -- right to that section.

Dan Maguire: Right. I think you're absolutely right. I think you know, obviously, employers are trying to make decisions and balance the different - the demands that they have and here there is an accountability standard through the Internal Revenue Code. And so, you know, obviously, there is an incentive to do the right thing and employers have been doing the right thing for a long time. And as you say, it is difficult to balance all the demands here.

Ashley Gillihan: And I'll be brief on this, but I do think it's important. I know we are trying to work with the employer shared responsibility rule and it may not be providing much assistance in that regard.

I think whatever comes up within 1513 for the employer shared responsibility will dictate, to some extent, for those employers who do not want to be imposed with that [excise tax] that will dictate that to some extent.

But when you look at 1511 alone...

Dan Maguire: Right.

Ashley Gillihan: ...and the way that it is worded, I think that dictates this kind of standard on each other.

Dan Maguire: Amy.

Amy Bergner: And I agree with that. I think that some employers would want to follow the 30 hours per week standards to both avoid such shared responsibility [penalties] and that would - that definition would work fine for them for auto-enrollment. But there is a choice there that employers have, and so to give respect and actual meaning to that choice, I think there has to be flexibility for employers to choose to have a different definition.

And, I know for other purposes under the Internal Revenue Code, there are specific carve-outs for seasonal and temporary employees that have some definition around them. I think, you know, that might be something to look at -- to actually have some carve outs too. So that employers who wish to exclude these employees may do so.

Erik Lieberman: Yes and I agree with those comments. Our industry has a tremendous amount of turnover and, for example, now it has actually gone down a little bit with the difficult economic times. But you know, recovery is coming and once we get back to a normalized economy, you know, it's going to go way back up.

But like right now, in our most recent survey we had 55% turnover for part-time employees and about 36% for all employees.

So, that's going to be a real challenge when you think about auto-enrollment, and we're going to look forward to working with the Department and through the rule making process to make sure that we don't face those challenges and we don't have part-time workers...

Dan Maguire: Right.

Erik Lieberman: ...put in there. But the turnover is something that you have to think about very carefully.

Dan Maguire: Yes. It's a challenge.

Erik Lieberman: Right.

Dan Maguire: It's a challenge. Manny, maybe you want to talk a little bit about multiemployer plans also and the peak issues there.

Manny Pastreich: The reality is that our issues, per se, aren't that different than any employer's issues. We have employers that have high turnover. We have employers which -- I think -- we have lots of members whose hours are changed and I think that's something that I can agree on -- it's a very complicated issue.

I think, again, you want to go back to how do we encourage coverage. (Inaudible) encourage coverage. But I mean when I just think about the members in our union alone we have members who work at schools, who work for 9 months and they are laid off in three months in the summer.

We have members who work in the stadiums and whether it's baseball season or football season and whether the Yankees make the playoffs or don't make the playoffs really changes the number of hours that they have.

We have homecare workers who if their clients goes to the hospital for two weeks they could fall below a certain hour of standard or go above it.

So, that, per se, doesn't answer the question. I think whether your standard is 30 hours or not, in reality when, you know, if we're being honest about what we've done, is we have had a "reasonably scheduled out standard." We have a system to enforce that, which is nice, through a grievance procedure and we've also used look back -- we looked back three months and we worked X number of hours over the past three months you're eligible for the following -- and that helps. To turn over another thing, you look back three months and that person is not there anymore -- not a big deal -- but they are not covered. So I think both systems are helpful.

Dan Maguire: Anyone else have a comment on the multiemployer situation at all?

Amy Turner: I have a follow up. You had mentioned some sort of grievance procedure?

Manny Pastreich: Yes.

Amy Turner: Could you elaborate on that at all?

Manny Pastreich: Again, we've seen many cases where someone is scheduled for 29 hours and that's just not a normal work week basically, because health care eligibility kicks in at 30 hours. And then, when you look back over your time period, they may have worked in reality 30, 32, 35, 40 hours.

Amy Turner: And who [do they direct] grievances to?

Manny Pastreich: Well, the union contract will allow them to go back and say, "I should've been covered for these three months" and you get that. It's not ideal because if you didn't have coverage you probably acted irrationally in how you try to get your health care. So, it's not an ideal system.

But at least it allows some encouragement from employers not to schedule you know, say, "I reasonably expect you to work 29 hours," when in reality, when you look back over [its more]- and I honestly think a 3 month period is a reasonable time period.

So, we have university workers who, during graduation and dorm move-in/move-out, they could easily increase their hours, five to ten hours over a three month period.

So, you really need to look back over a significant amount of time, but you also need to have some encouragement not to (inaudible) for people to know that they're eligible and be eligible. So not being scheduled for 29 hours when the standard is 30 hours, as far as that.

Ashley Gillihan: I might add, too, on the plan sponsor side, I think most of our clients, if not all, have a process similar to the claims review procedure to address pure eligibility determinations and these really fall under that.

So when we don't have a multiemployer union type grievance, it's still a similar process.

Dan Maguire: Thanks. Does Joe or anybody else have any questions?

Mark Iwry: Yes, but I want to make sure the Labor people fully...

So, I think we've heard a few different alternatives, and Ashley, I think I understand your "maximum flexibility" approach. And I think we understand the look back alternative that a number of you referred to.

Could you elaborate on how the "reasonably expected standard" would actually work? Could people be a little more specific? Amy? I don't know if it was you or Ashley, but whoever it applied to.

Amy Bergner: The way I think of it and the way I think many of our employer clients think of it is, you know, if upon hire, an employee is reasonably expected to work X number of hours per week -- or X number of hours per month -- they would be deemed to be eligible or ineligible.

You know, whether that is a full-time employee or an eligibility definition is for the employer, I think.

Ashley Gillihan: And I would say, we normally see it framed a little different way, but I think we're talking about the same concept, and that is "regularly scheduled" versus "reasonably expect"...

Amy Bergner: Yes.

Mark Iwry: It's better.

Ashley Gillihan: In my mind...

Mark Iwry: In your mind?

Ashley Gillihan: In my mind it is. But, under "regularly scheduled," it would be exactly as Amy has indicated -- you are hired to perform a job, and there is an expectation that you'll have to work a certain number of hours to do that.

Now, of course, as a salary person you're expected to get a job done -- whether you work 80 hours in one week to do that or you work 20 hours the next week to do that.

I don't know that those hours are monitored as closely but it's still a "regularly scheduled to work." I expect that it'll take you, on average, this many hours to get that job done.

But, what it does is, again, I go back to, I might as well use it if I can be saddled with the moniker, "maximum flexibility" to take into account some minor fluctuation. So, in the event that one week I did work more than

whatever the full-time hours are, it would not necessarily push me into full-time, but perhaps if I did that on a more regular basis it then would. That goes back to what I was speaking about earlier where employees have filed actions to say, "I am a full-time employee, look at how I'm working" and employers have had to back that up and say, "no, under the terms of our plan you're not" and having to find that and having to support that.

Mark Iwry: So, the process -- after the initial scheduling and someone is hired -- as time goes on and you have some of those situations that you all refer to where someone ends up working less or more than might have been reasonably expected.

Or, maybe it wasn't clear that they are reasonably expected to have variable hours and maybe the hours vary. What would do would you say? Are you suggesting that you'd leave it to the employer to determine from time to time whether to reassign someone and say, "my reasonable expectations are now different"?

And what if the employee's view is different from the employer's, or if the employee decided, "I think I'm really full-time," and the employer hadn't yet done anything about it, would you leave it to the appeals process or the interaction between the employee and employer? Is that how it would work on an ongoing basis? And if so, does everyone contemplate the same process?

Manny Pastreich: Well, again, we're only talking about an automatic enrollment process, per se, which isn't necessarily the eligibility process. And, on the automatic enrollment, I was thinking of a word, it may not be a fair word, but it's almost like a "tickler," because I can't imagine many people have actually used whatever processes that their benefit fund has -- appeals processes. I just can't imagine that people are aware of them or have used them.

So, this would say to me, you know, “for whatever reason over the past three months I’ve actually worked 35 hours,” I would say, “You know what Manny, you’re eligible for health insurance, you know, you’re signed up. Now, here is how you can get out of it,” or “here are other options that you have.”

But all it’s telling me is that, you know, “you have a health insurance plan, you’ve now become eligible, we’re enrolling you, and if you don’t want to be enrolled do X.” So, I think that this is in terms of getting people to think about health insurance and sign up for health insurance that this auto-enrollment process looks good.

Mark Iwry: Manny, I may not be following you. It sounds like you moved into describing a kind of “look back” that you turned out to be working 35 hours during the quarter or whatever the period might be, but my question, and I think maybe what you co-panelists are talking about, is whether after, let’s say three months or six months, there is any requirement that anybody look at that.

Obviously, if the employee and the employer get together and say, “Gee, it turns out I’ve worked more than 30 hours. So, we’ll all treat you as now full-time and automatically enroll you,” that works fine. But, if no one takes the initiative, the employee may or may not be counting and the employer may or may not be counting.

Do you think from your standpoint at the SEIU, are you suggesting that it would be best to let current practices continue and the employer would just decide from time to time whether to reassign someone for this purpose?

Manny Pastreich: Are you asking me what the eligibility should be? 30 hours? Or should there be...

Mark Iwry: There is no particular hours standard.

Manny Pastreich: Or are you asking...

Mark Iwry: A 30 hours standard to the auto-enrollment? That's the standard under the tax provisions for responsibility. But I'm asking how would it work? I think, you know, Ashley has described it working by the employer basically deciding from time to time whether to reassign someone or auto-enroll someone if it turns out they are working more or less than expected.

Are you talking about the same [standard]?

Manny Pastreich: I think I am. I am.

Mark Iwry: It's sort of a follow on "reasonable expectation."

Ashley Gillihan: I would say...

Mark Iwry: We know how it works on the date of hire.

Ashley Gillihan: It's a combination of the things, and I don't mean to interrupt you.

Mark Iwry: Good.

Ashley Gillihan: But take the combination of things. We are required, including the through ACA, to provide a summary of coverage that will describe what the eligibility rules are, and in doing so, we have to describe what a full-time employee is. We have a summary plan description that describes what that is, and many

times the definition of full-time employee that is used in the plan is broader and it's used for other employment purposes.

I think everybody involved -- and this goes back to me saying this has been something we've been dealing with since the plans for years and it seems to be working because of that -- I think everybody has some ownership in this and because everybody is involved, it works.

Manny Pastreich: I think the (inaudible) should be clear and people should know what it is. That we can agree on, and I think the question is: After three months, the person has worked a certain number of hours that are over what would make you eligible -- what should happen? Should you be enrolled or...

Mark Iwry: After any period of time...and when does it get decided.

Manny Pastreich: Right. And, well hopefully, the eligibility criteria are clear, and I think that could be the employer's eligibility criteria. It could be helped along by regulations or not, but the question is-- if someone meets that eligibility criteria—for example, I've been working at a place for two years and for whatever reason the last three months I worked 35 hours and the employer criteria is 30 hours, should I be enrolled in the plan when I wasn't enrolled before?

I think generally, with probably some exceptions, you should be enrolled in the plan. You'll have the option to get out of it if you want but you should be enrolled. That should be a tickler or a trigger to get you enrolled in the plan.

Amy Bergner: I'm not sure that this provision requires that. You know, it requires new employees who are full-time to be automatically enrolled. It doesn't necessarily require some mid-year enrollment at a certain point in time.

Current procedures for most employers are -- even if somebody is crossing a threshold for eligibility in the middle of a plan year, typically that individual would not be enrolled in the plan until the next open enrollment date, and I don't read the statute as requiring anything different necessarily.

Mark Iwry: That's kind of what we're asking, and I don't, certainly, want to be diverting from the automatic enrollment statute to the other provisions because this is an auto-enrollment forum.

Amy Bergner: See, I don't think we want to see the situation where people are slipping on and off of coverage due to going over or under an eligibility standard. We get all kinds of issues with rescissions and with COBRA and I mean it just kind of balloons out of control.

Mark Iwry: Yes. I mean people have been making that point very persuasively.

Amy Bergner: Yes.

Man: And this is why some of these employees may not want the employer-sponsored coverage, too. You know, in some cases they can become ineligible for Medicaid or subsidies for Exchange coverage.

So, that's something you need to contemplate as well. I mean, we can't have a system where people are flipping in and out of eligibility or automatically enrolled. That's going to create problems for both employers and employees, and there are going to be a lot of administrative headaches.

It's going to impose a lot of unnecessary costs.

Ashley Gillihan: And I would also assert that there is -- I'm not aware of any provision in the ACA that requires employers to cover full-time employee.

The plan, ultimately, will dictate that one way or the other. If they choose to follow the 1513 rule, whatever that may be for, they'll avoid (inaudible) if they choose not to, they'll have to deal with the (inaudible).

Dan Maguire: Your situation is probably dictated somewhat by your collective bargaining agreement.

Manny Pastreich: Well, I guess the way I remember the regulation, it says "that newly full-time employee." So we had many situations where someone was working part-time, and in a very clear situation, when their hours were increased, you know, they bid on a full-time job and they got it.

You know, I think probably most people would agree, in that case they probably do fall under full-time. And, then there are less clear situations. And I think we can all agree that these less clear situations require deep thought, you know? A lot of people work a lot of hours for three months or six months or whatever.

But, if we view auto-enrollment as something that encourages people to sign up for health insurance, then we wanted to figure systems that encourage people that put it in place in reasonable circumstances.

And I think there is a lot of reasonable circumstances for people that are working a lot of hours, whenever they are regularly scheduled, that they should be eligible or are eligible and don't know it. And this would give them a tickler to go to do something -- go on the exchange or take the employer challenge.

Joe Piacentini: How often does it happen that the initial expectation or main schedule and the hours that come to pass are different? How often do you reasonably expect or schedule somebody initially that worked 20 hours and it just turns out they end up working 30 hours? Is that common, is that rare? And then, sort of a variation on that question, how often is it just plain hard to say? If there is no particular schedule this person has been hired but you really don't know on the day of hire how much they are going to end up working. It could go in different directions. Do those situations exist as well?

Erik Lieberman : Well in the retail industry, particularly on seasonal times, you have surges with which can make unpredictable in terms of figuring out how-- what kind of hours folks are going to work. So that's something to consider.

Manny Pastreich: My view is that it happened enough that you have to worry about it. But then the question becomes a time period overlook. You know, obviously, it's Christmas season, there is a big surge.

You know, when we think about our university folks there are surges. Over a three month period, you know, that probably will even out, and partly because employers don't want people for some of the reasons that Ashley was talking about. Employers are watching the eligibility and they don't want a whole group of people becoming eligible in their system and having to deal with that.

So sometimes they'll control it. I don't think it's -- I wouldn't say it's -- a lot, but it does happen.

Amy Bergner: Well I think it's not -- I think it's particular to the industry. You know, there are some industries where I think it's probably not happening at all, but very rarely.

Dan Maguire: All right. We have a few minutes before we go to the audience and the phone. It sounds like, you know, the next topic is sort of cost, burden, and administrative issues.

And, obviously, it sounds like, you know, the particular industry and the in and out problems are, you know, areas where it's going to be clear that there is going to be more administrative burden probably than more state employment situations.

I don't know if there is anything else we ought to know or you want to bring to our attention in terms of the hidden cost or hidden administrative issues.

Amy Bergner: Well, I think it's not just in the industries that have high turnover that they are going to see increased administrative costs. I think any employer who is not now automatically enrolling or even those who are, are going to see administrative costs with the notices, you know, and processing changes. Because when you automatically enroll people, they may want to opt-out, but they may also then decide they want to change a plan if they are able to.

There are indirect costs of having increased enrollment which, you know, employers would be concerned about and want to get their arms around, kind of unavoidable.

But I think there are also some unintended consequences that will have cost. If -- depending on how these rules are structured -- I think many employers would consider either imposing or extending a waiting period to allow longer

times for people to be opting out of it essentially, and, you know there - that may be a consequence you want to avoid, so and there may be others as well.

Erik Lieberman: And in the retail industry they're logistical challenges too. You know, our businesses are not very centralized because our employees aren't stationed at computers. There are, you know, many, many stores and educating employees about benefits will be a challenge because of the nature of our industry.

And also, when do folks have to automatically be enrolled? I mean if you do that, if you apply that on a monthly or a quarterly basis, that's going to impose a very big administrative burden too.

Manny Pastreich: Again, this isn't eligibility, it's automatic enrollment. So I'm being hired in any industry and I expect I qualify for the plan with the question of: Am I provided the information or not, and am I automatically enrolled or not.

Hopefully people are being provided the information. And I'll tell you, our experience is that they're not. That I may be hired, I may be eligible. I may not get the information. I may get it. A lot of employers do do it through the mail -- they say the centralized thing and do it through the mail which I'd say is not ideal.

I understand why they do it, but it's not ideal. And I think for whatever reason, people sign up less when they get something through the mail than when they get from their -- from the Human HR department or their supervisors.

So the process, per se, isn't changing. If you're eligible, you're eligible. The only question is, are you being automatically enrolled? And I think there is an argument to be made that automatic enrollment actually is a simple process.

You know, there is a new disclosure and I think that disclosure is important and the process is simple. And there is a benefit to it, you know, beyond that.

Erik Lieberman: Right.

Dan Maguire: Okay. And I think there is more discussion of some of these other issues and topics for the panel coming after us. So I think now is the time that we would turn to the audience. Are we are going to do the telephone first or the audience first?

Janet Walters: Does anyone have any questions on the phone?

Dan Maguire: Okay, do we have a question from the telephone audience?

Coordinator: Yes. One moment please. Our first question on the phone comes from Kevin Maroney. But if you do have a question, it's star 1 on your touch-tone phone. Please unmute your phone and record your name and organization at the prompt.

Kevin Maroney, please state your organization. Your line is open.

Kevin Maroney: Thanks a lot operator. I'm with United Healthcare and thanks for taking my question today.

There are state law requirements that define full-time employment for purposes of fully insured group health plans, and I'm just wondering if the panel or the Department has given any thought about coordinating with state law so it would avoid situations where someone could be required to be

enrolled under the federal rule, but then might not be required to be a full-time employee under that state regulated fully insured product.

Dan Maguire: Well there is a --hi, Kevin, by the way, this is Dan.

Kevin Maroney: Hey Dan.

Dan Maguire: Kevin is a former employee of the Department of Labor and is now working for the private sector.

Mark Iwry: (Inaudible).

Kevin Maroney: Thanks Mark.

Dan Maguire: He worked more than full-time when he was here. But Kevin as you know, there is a part of the provision on auto-enrollment that talks about preserving state laws unless they prevent the application of the auto-enroll provisions.

So, you know, as we would probably do in any rule making, we would look at state laws. We look at other federal laws when we're attempting to apply the definitions that might be broadly accepted and that people would look at and that people would be familiar with and built their systems around and so forth.

So, I think as part of the process, we certainly would be considering that, but obviously, with the idea in mind, you know, there is that sentence in the provision that, you know, we sort of have to meld the state law with the federal requirements. I don't know if anybody has...

Kevin Maroney: I guess I was reading that sentence in the statute Dan, to be with the respect to payroll.

Dan Maguire: Yes – yes, no, that’s what it says. Yes, exactly.

Kevin Maroney: Okay.

Dan Maguire: All right.

Amy Bergner: That may be a reason to allow flexibility in defining full-time employee so that an employer with an insured plan in a participating state can, you know, continue to operate in conformance with the state law.

Dan Maguire: I think you kind of want to try to write the regulations so that state and federal laws all work easily together.

Man: Right.

Janet Walters: If anyone in the room here has a question we have a mic in the middle of the room.

Man: Okay.

Karin Feldman: Hi, I’m Karin Feldman from the AFL-CIO. As we’re sitting here and listening to people talk about full-time, part-time -- kind of worries me because I’m almost inclined to agree, because Ashley and the maximum flexibility approach might be helpful. Which is not where one might expect labor to be.

But what I’m not hearing anyone recognize is, besides seasonal and temporary, we have industries where scheduling is such that -- particularly our affiliates who have workers in the transportation, airline, and railroad industries -- they have certain schedules or other rules that come in, that are

not classic, and within the meaning of full-time -- tied to hours, has no meaning.

So, I think in considering what's a full-time employee, and it does to some extent also spill over into the employer responsibility provision, you have to be very aware of practices in the industry that exist; other rules or statutes that may implicate them. Because otherwise, we will create situations where the employees have been covered by plans and now all of a sudden you want to overlay a set of rules which will invite employers to say you don't need them and we're not going to cover you [as a full-time employee under the plan].
Thank you.

Dan Maguire: Thank you. I think, you know, the one thing that we are sort of all digesting is sort of the magnitude of the variations that are out there. And obviously it's a very large economy with many, many variations. So, the enhanced flexibility or the max flexibility standards are obviously just sort of acknowledging how difficult it is to fashion any one rule that might fit, potentially, a large number of those situations.

Manny Pastreich: I mean, one thing we didn't talk about is the, sort of, differences in multiemployer plans. And when I was trying to think about that, there were, sort of, three things that struck me as the differences.

The first is that they're dictated by collective bargaining presence. So while the folks may take a year or two to put this in your employer plans and collective bargaining plans, they need up to five years because that plan may define eligibility and/or enrollment for up to five years.

So, I think that that is one thing that is different. You know, multiemployer plans, by definition, have different employers with different issues potentially

different industries which is the third point is that multiemployer plans often cross industries or sectors so they have different issues from time to time that all come into play.

Amy Turner: So, and just to follow up on that, you had also mentioned before, Manny, about having a minimum quarterly look back period. Could that be a quarterly measurement period to look at different employers to say, “well, did you meet, you know, the hours requirement?” And then “do you need a separate plan or a separate calculation period from what that?” How does that work typically when you’re just enrolling people without the automatic enrollment?

Manny Pastreich: Well, I can only tell you from our experience. We have some employers that are in a plan where they look back and the standard they use is 80 hours a month and they look back over; you have to work 80 hours three months in a row to be eligible. And not only eligible if the employer plans are automatically enrolled.

I’m not sure I answered your question but that...

Amy Turner: So at the end of the third month, that’s three months in a row?

Manny Pastreich: Right.

Amy Turner: Once the plan gets that information from the employer, how long does the plan need to process that?

Manny Pastreich: So, if it’s September, October, November... you’d be covered in January.

Amy Turner: So there is another month delay to process that information.

Manny Pastreich: And we definitely don't...there is obviously no point in covering people for those three months - those first three months because they didn't use health insurance benefits.

Dan Maguire: And then how would it work going forward?

Manny Pastreich: I think a "reasonably expects standard" is probably the best you can do. You know what I mean? You can probably argue whether a "regularly scheduled" or "reasonably expects" are the same thing or different, but at the heart of it I'm not sure what you can do beyond. You're going to be scheduled 30 hours and that is true.

You know, again, it would be nice to have a little bit of ability to say, "well, listen, at some point that's not real. You scheduled me at 29 hours but from the first week I was working 32." It would be nice to have some system.

But again, we're only talking about automatic enrollment here not eligibility, so I think this still needs to [have some flexibility].

Dan Maguire: Right, that actually is a very important distinction.

Dan Maguire: Yes, we can take another question from the phone.

Coordinator: Thank you. Our next question comes from Tim Jost. Go ahead sir, your line is open. Please state your organization.

Timothy Jost: This is Timothy Jost with Washington & Lee University. Just wanted to note something that I think Manny mentioned but just wanted to make sure that everyone got it. And that is that the statute talks about enrolling new full-time

employees not enrolling new employees. So, if an employee transitions from part-time to full-time it seems to me that that's an issue that has to be addressed by the regs, at what time has somebody done that. And at that point, they should be auto-enrolled even though they are not a new employee, technically. Thank you.

Dan Maguire: You want to comment on that?

Dan Maguire: I guess, you know, Tim's comment was that, you know, if you're hired as part-time but you transitioned to full-time, that would be another category.

Mark Iwry: That's what we were asking about earlier. That's why we're asking how do you contemplate these as working overtime when someone does move from part-time to full-time or in the other direction?

Ashley Gillihan: I can't get into the practicalities of it. That's not uncommon in the plans and where only full-time are covered. People obviously do transition and they become covered.

Mark Iwry: We've heard a lot of detail from a lot of companies about how they do it. As you were saying, Dan, it shows a lot of variability among companies. But there are a lot of companies that have laid out, "Here is how our system works, and I think it works well." But, that's why, I guess, we're asking. Did you all have anything before the panel closes? Anything further in terms of specifics that you'd recommend either doing or not doing certainly be interesting?

A lot of the employers have been really specific on, "here is what happens next" -- whether it's a one year look back or a nine month or three month look back or some other [standard].

Amy Bergner: Well, I think, as you said Mark, it's all over the board. It's great variability and, you know, for example, one of our clients has a calendar year plan and they take a snapshot July 1st of the prior calendar year of how many hours employees have worked, and on the basis of that they will make them eligible the next January 1st. You know, so they need that much lead time to process all the data and so forth.

And, you know, other employers use kind of a three to six month period to look at how many consecutive months somebody has worked 35 or more hours, and then they will wait again until, you know, some future date to enroll.

And typically, it's the first of the next (inaudible). It's kind of a parallelism between the look back to what I might call the look forward -- like now we looked back three months, six months, a year. Now that the person is enrolled are they enrolled typically for the same length of time -- three months, six months, a year? I don't think there is a relationship there, but I don't have data.

Dan Maguire: So, they might be enrolled until sort of like the next open season or something like that?

Amy Bergner: Well...It's huge variability. You know, some employers are tracking this weekly because they have people who fall in and out of eligibility for a limited medical plan.

Amy Turner: Yes, I'm just thinking about this. I think some people mentioned before the in and out, you know, can be very difficult.

So, if you have people that you're looking back, I'm just wondering how long are they enrolled, or are they only enrolled for three months and then they drop out, and then they drop out for three months and they are automatically enrolled again. I'm just trying get a sense of all the in and out that is used... potentially really disruptive to everybody.

Manny Pastreich: Right. And you're asking a question really that's an eligibility question. And you probably want an eligibility [rule] that makes sense.

And I think, you know, you don't want people going in and out -- you don't want people to go into the subsidized Exchange and going into private employer and going into nothing.

So, I think but in some ways it's an eligibility question as much an automatic enrollment question. You know, I say if you have an eligibility system that makes sense where your regulations are encouraging eligibility systems to make sense, than an auto-enrollment process hopefully will follow from that in a way that makes sense.

Dan Maguire: All right. We have time for at least one more question from the audience. Anyone here have questions?

Amy Clary: Hello, I'm Amy Clary with The American Federation of Teachers, and in addition to our number in K12 education who work frequently 30 hours to a week but only during the school year we're concerned about their situation.

Also our members in higher education are in a particularly interesting situation particularly the contingent or adjunct faculties who may work by the semester teaching three courses, four courses, sometimes even five courses per semester. Which equals or exceeds the teaching load of senior track or

full-time faculty. Their workload isn't measured in hours per week as much as it is credit hours per semester, which only measures time in the classroom and of course not time speaking with students or grading or preparing.

And so whenever we talk with members that question always comes up: "What's 30 hours?" Can we use it for contingent or adjunct faculty?

Dan Maguire: Thanks. I think we look forward to your input also. How to solve that will be a challenge. All right if we could go to a question from the phone.

Coordinator: Our next question comes from Ryan Husing. Go ahead sir, your line is open. Please state your organization.

Ryan Husing: This is Ryan Husing from Methodist Health System. And thank you for taking my call.

I believe that towards the end of this conversation here, you know, we're getting to the main concern or point of frustration for employers and everybody, in that I think that if you look at anything other than, you know, what is reasonably expected for an individual to work, we're all going to give ourselves a lot of headaches administratively with employees potentially moving in and out and in and out [of coverage].

I work in the health care industry and, you know, we have employees that are regularly scheduled to work 20 hours a week or, in other words, their budgeted for 20 hours a week. And we draw our line at being eligible for the health care plan at 20 hours a week.

We also have a lot of nurses that we consider to be supplemental or casual employees. And you know they are brought in to work more hours as our census is higher. So their hours could fluctuate greatly.

And that just being an example that if we had those nurses who were in the supplemental status that are not regularly scheduled to work a set number of hours moving them in and out of the eligibility for the plan and subject to auto-enrollment for the healthcare plan. I think it could just cause an awful lot of frustration for both employers and the employees themselves. Thank you.

Dan Maguire: Okay. Thank you

Mark Iwry: Dan.

Dan Maguire: Yes.

Mark Iwry: Might we ask for a follow-up? Are you assuming in your question that any system other than “reasonably expected” without any particular parameters would be of a particular frequency?

I think some of the panelists, for example, mentioned with approval the idea of look back followed by a stability [period] of different durations, like 12 months -- I think that is what a couple of you referred to.

Are you talking about people having to move in and out even if the employer’s system checks them every twelve months to see what their hours are?

Ryan Husing: I’m sorry, I’m not sure if I understand your question. I guess my point was that, you know, if you were to use some kind of a look back period, looking

back three months for example. And I guess to try and avoid an individual moving in and out of eligibility and subject to auto-enrollment. If you said, okay during the last three months they worked on average 30 hours,. So, the following January 1st you would be eligible for the health care plan for you know, whatever period of time. If you did that and an employee happened to be working, let's say, just an average of 10 hours a week during that period of time and the only reason why they are eligible for that period of time is because of the look back period you know, we may end up with equity issues as well, where we have employees that are regularly scheduled for 10 hours,, budgeted for 10 hours, that are not eligible for the healthcare plan.

But, we have these supplemental employees that are receiving a benefit from the organization simply as a result of them working an average of hours over a certain period of look back period. So, I think that could cause issues.

Mark Iwry: So I guess -- I think I understand what you're saying. My question is, does the concern you have about moving in and out apply equally regardless of how long the look back period is? And, how long the whole study period is once you determine if you took a look back approach as some of these companies do?

Ryan Husing: Yes, I think a look back period [problematic].

Mark Iwry: Is the problem equally serious whether it's a year look back and a year stability period, or is it only a problem if it's a short period for either of those?

Ryan Husing: I think any period of a look back would be difficult to administer.

Manny Pastreich: What I hear Ryan saying, to some degree, is that we have a category “contingent nurse.” And whether she works 10 hours or 50 hours, and whether that’s for one week, one month or a year, that we don’t provide benefits.

And you know, that may change in 2014 when the guidance [on what the 30 hours is, and the penalty] may be changed. But, I think what they’re saying, that’s what I hear them saying. And you know, I think that again it gets to an eligibility question as much as an auto-enrollment question.

And I think, you know, this will cause that person to be eligible. If the employer decides they are not eligible, they are not eligible, and then they’ll pay the penalty or they won’t pay the penalty in certain circumstances in 2014.

Ryan Husing: Yes, while they are separate issues, they are linked because, you know, your eligibility has to tie in with the auto-enrollment as well, I believe, in some fashion, because if you set your eligibility at one point, that just-- it has to coordinate with what we consider to be full-time employees.

Amy Turner: What I hear some of you saying is that you think employers want the choice -- that they are going to look and see what the employer responsibility penalty is and then decide whether to pay it or not.

You don’t want the Labor Department auto-enrollment rules to automatically follow and require these people to be eligible and enrolled. You’d rather give the employers the choice about whether or not these people are eligible.

Ryan Husing: Yes, I do feel that way. I mean we, you know, I’ve heard people kind of laughing and joking about the maximum flexibility approach, but I think that’s

a practical approach. Just, you know, due to all the issues that all of you are discussing here today.

Ashley Gillihan: Just want to make two points real fast, if I may. First, I don't think if we choose a particular category like a "contingent nurse" or what have you that that changes the amount at all. The employers are making full-time employee decisions not only for benefits but we do -- we can incorporate that into the plan if that is not already.

Secondly, there needs to be consistency between 1513 and 1511. And consistency doesn't mean that they both have to have standards. It simply means that if there is a standard in 1511 which we would suggest the -- my new trademark phrase by the way -- "maximum flexibility standard."

Man: Get (inaudible).

Ashley Gillihan: [That's not inconsistent. Two different standards.]

Dan Maguire: Yes, I think there is sensitivity to that. Obviously, you want to make it as reasonable as possible for people to comply with the various requirements.

Well, I think we've exhausted our time here for the first panel. I'd like to thank our panelists, Amy, Ashley, Erik, and Manny, for a very vibrant and thoughtful discussion. Thank you all very much.

Man: Thank you Dan.

Coordinator: Please stand by for the second session.

Joe Canary: Well I apologize for getting you all to sit down. Just bear with us for a minute just to make sure that we're online.

Janet Walters: Sharon, are we all connected?

Coordinator: Yes, you're all connected.

Janet Walters: Great, thank you.

Joe Canary: All right, thank you very much. I think that was a fantastic first panel. Now we're going to move on to the second panel of our three today. The subject matter is going to focus on something a little different; in the second panel we will focus on a selection of the plan benefit package, and coverage if the employer maintains more than one, in which plan employees will be automatically enrolled for purposes of the automatic enrollment provisions in Section 18A of the FLSA.

We have an excellent panel and very well qualified. Unfortunately, because of time, I'm just going to limit the introduction just to name and the position.

We have Helen Darling, President and CEO of the National Business Group on Health. Jennifer Henrikson, Senior Council ERISA Health and Welfare Outsourcing AON Hewitt. David Johnson, Senior VP, Riggs, Counselman, Michaels & Downs, and Scott Kennedy Vice President for Target Group.

Man: Joe can you say who you are?

Joe Canary: Is that really necessary?

Man: Everybody knows you but...

Joe Canary: All right probably not. As the moderator of the second panel I'm Joe Canary I'm Deputy Director of the Office of Regulations and Interpretations here in the EBSA.

I think we have a couple of new people joining the government panel and they will just introduce themselves briefly.

Paul Mannina: I'm Paul Mannina with the Solicitor's Officer.

Chris Cosby: Chris Cosby from EBSA's Office of Policy and Research.

Joe Canary: And so with that let me start with the first discussion topic for this panel. The first discussion topic is what coverage new full-time employees may be enrolled in, for example, self only coverage or family coverage. As a subtext of that, are there concerns regarding identification of a spouse or dependents for automatic enrollment purposes?

I think we're going to have Helen start the discussion for us.

Helen Darling: Thank you. Well first of all we want to keep it as simple as possible for our employers. So we would argue for self only.

If I may, I'd just like to -- I'd like to reinforce a couple of points that were made earlier but are related to this.

The flexibility and the idea of flexibility is really important. Certainty, and I heard that earlier, long planning time and simplicity, and then self only, really, relates to the simplicity argument.

This will be a culture change for not employers as much as employees. You know, they are not used to having these things happen too necessarily.

So the easier we can make it for them to understand what their options are for [auto-enrollment purposes, the better].

Jennifer Henrikson: Yes and I'm here from an outsourcing company that enrolls millions of people every year into benefits. And seconding what Helen just said, about 50% of the AON Hewitt employers large employers do some sort of an auto-enrollment today.

So, there are employers out there and employees who are very used to auto-enrollment.

So, just to give you a thought, the prevalence around that goes into the employers who are auto-enrolled today, they do auto-enroll into self only. And we would also add that I know one of the questions relates to dependents and whether dependents should also be auto-enrolled along with the employee. And for a couple of reasons, we would suggest that not happen. One being that just from simply an administrative prospective -- in order to get the data about a dependent, we don't know about those dependents until there is an active enrollment.

So, no one would know about my daughter unless I went in and actually entered her data.

So, to auto-enroll a dependent would be very difficult because, of course, we wouldn't know who to auto-enroll.

In addition, nowadays, especially with health care reform and keeping dependents on their parents coverage until age 26, there are a lot of dependents out there. I hope my dependent who is about to graduate from college who will get a job and have her own coverage.

So the hope is -- the idea is -- if my daughter were to be auto-enrolled, if I were to take no action would mean she would have coverage that she didn't need. The hope is that dependents will not be auto-enrolled.

Helen Darling: You also talked earlier about the [administrative burden] and the cost when you think about the complexity. First of all, not even knowing whether somebody is a spouse or domestic partner -- they may be separated, there may be no connection, there may be a lot of things that would be very hard for somebody to know.

If you have to get information like that or if you were somehow penalized if you don't get it then you've added a burden on top of an already burdensome [auto-enrollment process] that you don't need to do.

Scott Kennedy: I think that the one data point that I would give, as well to further Jennifer's point, is certainly, in our own employee population, what we observed is that about two thirds take up coverage on our plans that we know around 90% have medical coverage, furthering agreement with Jennifer's point.

But auto-enrolling at the family level, most likely, would result in duplicate or double coverage of that employee.

David Johnson: To add further weight to what the other panelists said, I would absolutely concur that it really should just be the employee that's auto-enrolled. If the dependents were required to be auto-enrolled that only -- not only creates

problems from the employer's side, but I think it would also create problems from the employee side. The spouse's side is auto enrolled.

Because let's say the spouse is in a high deductible plan with an HSA, and therefore is not able to participate in a traditional plan. Well, if that spouse is auto-enrolled into a traditional plan through the employee, that creates problems for the spouse.

So, I think if we look at it from that standpoint that is it good for the employee, you know, what's the burden on the employer, but also what's the burden on the employee?

And I think auto-enrolling family members gets a negative score on both sides, because even from the employee's prospective -- or the spouse's perspective -- it could create problems. If the employer's required to auto-enroll that spouse into the plan. There is a whole lot of other problems that are inherent that we're not even touching on because, I guess, as we kind of looked at it -- seemed pretty obvious to us that it would be a bad thing to require employers to auto-enroll.

But, certainly if there are questions that people have, I mean, we can go into more details of where it would be bad, either for the employee or the employer.

Joe Canary: Now let me -- I think probably there will be opportunities to go into more detail as we progress into evaluation issues, but let me follow up on one question. Is what I'm hearing is that the idea may be that auto-enrolling family members without your permission would not be an option?

The available plan, is you're saying, some sort of circumstances that may be a disadvantage to the employee. Is that correct?

Helen Darling: Well think about it as being if the employee wants the family [coverage] - first of all, they can enroll themselves then the auto-enrollment doesn't have to happen. If they are given choices, which they all are, when they are hired or when there is an open enrollment, they're given lots of information about their options -- a lot of detail. Most employers provide so many forms, you know, they have train-the-trainer sessions. They make a lot of information [available] about what's happening.

When somebody comes, you get a package. You get a lot of information and you're talking about just the people who don't act on what they're already given, and you would have to wonder if somebody wanted to cover their family they certainly would be doing it then. It's a very high probability.

So there -- it's adding a process that is much more complicated and not only adds cost to the system it confuses everybody. Everybody will be confused.

Joe Canary: Yes, I guess I was maybe focused on a more technical question, to say, are you suggesting that we consider just not permitting auto-enrollment of dependents, so that it's not even an option for the plan? Do they consider this being something they can deal with administratively.

Scott Kennedy: I would go back to the flexibility option. You know, employers know their employees best. I think the one thing that we do not want it to be is to rule out the ability to just be employee only.

But the inverse of that would be to have ultimately an employer or an employee population that may choose to make it their business to enroll in

auto-enrollment choice. But I would say just make sure that the rules do not preclude the ability for it to be employee only.

Joe Canary: Maybe we should move on to topic 2, which is what plan and benefit package, if more than one is available, should a new full-time employee be automatically enrolled in?

For example: the least expensive, the most comprehensive coverage, fee for service plan, an HMO, or the shortest eligibility period. To help me with this one, Scott is going to start us on.

Scott Kennedy: And just following up on from the last set of comments, allow the employer to make a choice on this one. Let them have the flexibility as long as the plan is one of essential health benefits into the actuarial minimums that any plan from that and above will be something that the employer would be able to auto-enroll an employee into.

And so all the ones that were listed in the question packet -- least expensive, most comprehensive, fee for service, or an HMO -- any of those employers could so choose. And doing our own benchmarking, I think that for those that do auto-enroll. There is a variance in which plans do they auto-enroll their own employees into.

For us, you know, I would look at this one and given our population we would probably go with lowest-cost single team member-only plan for them to auto-enroll in, because if they do want to opt-out then it is the lowest premium.

It still gives them preventive care coverage at 100%; it still gives them catastrophic coverage. It still pays a good plan to put them into, but it is the

one that as the lowest premium price for them that would be least penalizing to their pay packet, if they've chosen not to take other action to get into a plan.

I think the one thing that maybe would put some more context to this too is, that I look at the overlap here of, you know, the eligibility question and then the auto-enrollment piece -- is that we should look at bifurcating the employee's life with the company into two places.

One is their first year of employment, and that's really the one that employers would need to think about what period of time would determine eligibility for them to consider auto-enrollment in 90 days or 180 days, whatever we determine it to be.

It becomes that point in time that an employer can react and provide the enrollment materials to an individual for them to enroll in the plans.

I would advocate for a look back system that is quid pro quo. This is a question that came out in the previous panel as to if you look back in 12 months and you give somebody coverage for the 12 months. It avoids and minimizes the risk of flipping in and out of plans.

And then, you're only dealing with your auto-enrollment issue getting back to our panel's point. How we are dealing with your auto-enrollment issues at one point during the employee's first year with the company and then at regularly scheduled intervals in the rest of employee's life with the company?

Jennifer Henrikson: I would say similar to what Scott said -- it's similar actually to the last question kind of there be a floor as to what the employer has to do.

So in this case it might be assigned to the lowest cost coverage that's (inaudible) compliant. And then let the employer decide from there if it makes sense that it be something different.

And that's actually consistent, as I mentioned before, about 50% of employers today of AON Hewitt that enroll employers, employees and plans have auto-enrollment. And that's consistent with what employers do today -- they enroll them for lowest cost.

Helen Darling: So some surveys that we did, we found that most employees over half (inaudible) make a decision on cost and presumably lower cost, they choose the low cost plan.

The only... the time you might want to give my clients gives, obviously we like flexibility -- this is the maximum flexibility we heard about. We also (inaudible) maximum flexibility.

But it might be, for example, it might be that in any given year the low cost plan may not be the low cost plan that might become the high cost plan the next time. So you may, it's not a single target forever, it moves around.

And you also might, for example, it's new to that community where you have really good cost effective HMO's, which might be slightly higher than, say, a consumer [driven] health plan.

But if you have a workforce with lots of young families with lots of kids and everything that you may want to say, "Well, we can put most of our default plan in something slightly richer but have to be [cost conscious]."

You may have a different workforce -- like maybe with retail and everything and that's not what you want. But the employer should have a choice based on a combination which is what they do now combination of what they think is best for their workforce at that time usually in that region or that community. And it varies a lot like everything else.

David Johnson: And I would just add, you know, if anybody is keeping track of the word flexibility I'm going to use it again.

And really as long as the healthcare reform maintains the importance of that, you know, reliance on the private sector and that the government does not pick winners, I think you really have to allow the employer the flexibility to determine which plan the person auto-enrolls in.

I just think it is all kinds of problems apparent with the government and mandating this is the plan you're going to have to auto-enroll your employee in.

And it's very, very difficult to set a specific standard under which the plans -- the employer -- has to use a given plan. I think you really have to maintain that flexibility for the employer to make that call.

Joe Canary: Two follow up questions. I think it's probably, as you all know, that there may be plans where [auto-enrollment into the] group health coverage has failed.

And my expectation is in those plans, there probably is a choice among the benefits in that you might not necessarily be getting all the benefits by enrolling in the plan, but you would be able to choose and then auto-enroll in the individual coverage.

Other circumstances where that isn't the case and where you end up in a plan that's available, you have multiple benefits being provided under that plan and by enrolling the individual under the plan, you're getting access to more than just group health benefits.

I mean if so, how do you think that should be dealt with in this kind of [scenario]?

David Johnson: Joe, an example to your question is that it might be a vision plan that comes along with the medical plan.

Joe Canary: That's a good example.

Scott Kennedy: I mean as an employer (inaudible) by taking a separate program and it creates other complications.

Joe Canary: That's the general consensus?

Jennifer Henrikson: Yes I agree. I think that if -- because we do see separate enrollments for vision and dental -- at times and it's kind of across the board different depending on how they design their plans.

So I would say that if there is a separate election already for medical versus dental/vision maybe that's the way the auto-enrollment works. But if it's one election I would think administratively it would be difficult to auto-enroll part of that.

Helen Darling: I think communication, as part of this simplicity argument, is the administrative side which complicates it and it takes a long time to get set up

for it. But you got to communicate with people for the most part (inaudible) the reasons you're giving them.

And you're trying to give them information that this is incredibly complicated. Most people -- average people with college degrees, master's level -- they don't know their benefits and don't have all the details. So you want to keep it as simple as possible. One decision [could be that] if you make it simple, you're not going to have that many people you have to auto-enroll. If you really do make it really simple.

Joe Canary: And the other question is, so let's assume the employers have selected -- has multiple plans available, selected the plan which could auto-enroll people required to auto-enroll and then, down the line, changes the plan that would be its auto-enroll plan.

Should there be any conduct that has to be taken into account to take people that maybe auto-enrolled in the first plan -- to move them over, or should that just be separate and you make your choice and your auto-enrollment to whatever plan you decide to auto-enroll? So, the plan that's best at that point in time?

Jennifer Henrikson: So, well, certainly every year there is an annual enrollment. And so I think that from an administrative perspective it's probably, you know, even an employee trying to keep coverage similar or consistent that it makes sense.

And as Helen said, there is communication especially around the annual enrollment about, here's your coverage -- today here are all your choices, here is what'll happen, if it happens to be a client you auto-enroll today, here is what you'll be defaulted into if you don't decide -- so.

And you'll probably get to this question. But I think that we would advocate that whatever they defaulted into the prior year, if they don't make an election the next annual enrollment to change it, our thought is that's what they want.

And so that's the first question.

Helen Darling: And also it's depends on what the change is. So for example, I was a plan sponsor at Xerox and we had a network pull out of the health plan in a particular geographic area. And so we felt that that, basically, was a significant enough change that employees in this instance ought to be given the choice that couldn't make another choice on everything. But it was a huge change to the underlying plan.

But in that instance we gave them the choices they would have had in the instance of, you know, the plans they were losing.

Joe Canary: So why don't we move on to our next topic which is...

Amy Turner: Can I just ask one question?

Joe Canary: Sure.

Amy Turner: You had said before that everyone keeps saying employers should be given flexibility, and then there was a reference, but of course it should be coverage that covers essential health benefits.

Did you guys have any thoughts on health plans? I mean would employers be given flexibility? I know you had brought up before an issue about what if somebody was put in an HSA, and they are not really eligible for an HSA?

I mean, when you say employers should be given flexibility, would that be to enroll people in coverage that is not an HSA? You know, people from the HSA or an FSA? Would you exclude a health plan when you're thinking about giving employers flexibility?

Helen Darling: No, of course not.

If it needs to be a qualified plan standard, that's what you said. So the type of plan, and certainly there will be health plans that meet those requirements and in fact those can be very attractive, and they can also be without an HSA they could be current.

Or no account, in fact we are seeing more and more of those.

But that's actually a very attractive feature for lots of people. Especially those who are concerned about cost and if they spend money for the most part.

Joe Canary: And I know we're short on time. I don't want to take too much time, just let me ask a follow up. Now let's assume you end up with an HSA and a high deductible health plan combination. Would you be auto-enrolling them in both? You have a high deductible group health plan and the HSA in that context.

Helen Darling: They have to enroll themselves in the HSA. They own it, you don't. They have to do it, even if you give them money, they have to do it. But many people don't get a seeded account. But you could certainly put them in a consumer directed health plan.

And if you look at the data on the level of deductible and plans today the media and the country, it is very close to the same \$1200 of what the so called high deductible plan is.

And the plans out there -- are, themselves, have-- many of them have high deductibles. But once you meet your out of pocket limit, it's 100% of everything including in high deductible health plans.

Chris Cosby: Another question. One of my jobs is trying to establish a baseline of what is happening actually for the marketplace. And you said that 50% of AON Hewitt clients are automatically auto-enrolling right now.

I was just curious about what the size of those employers are? I know we were talking about (inaudible) hundred.

Jennifer Henrikson: Yes. I mean, Frank may be able to help me here too. We're talking very large probably 10,000 and above I would say. And probably more in the 40 - 50,000 range.

Joe Canary: Question?

Chris Cosby: Yes. I just want to ask a quick follow up. And then I think there is another question I'd like to ask. If you can answer that question, in terms of the choices that are made when people are (inaudible)- -- are they in the system? Where does it say where they are? Or did they opt-out?

I was just wondering what type of administrative burden an opt-out (inaudible) of the price?

Jennifer Henrikson: So you're planting me for the next question. Yes, basically what our data shows...

Joe Canary: I'm sorry maybe let me ask. Okay the next question is, should action be required by an employee to maintain coverage? If an action is required for the current employee and he/she fails to take the action, would you be reenrolled in the same plan, the same package, and the same coverage?

Fortunately, Jennifer was going to take that question...

Jennifer Henrikson: Great. Okay so in answer to Christopher's question, first of all as we mentioned 50% are auto-enrolled today, and of those 50%, 87% of employers continue their employee's elections from the prior year if they don't take action.

Now to be clear, as Helen has been pointing out, this is not one of those things where the employer just lets it happen they are -- they want to encourage active enrollment.

And you know, as Scott knows, there is a lot of communication that goes on around the annual enrollment -- trying to get, as you mentioned, the inertia going or lack of it. And so it's only as a last resort that employers then auto-enroll the folks.

So what they found is that, again, it's a significant amount keeping people in their prior coverage. And I think that the reasons are number one, it supports participant behavior.

So what we've seen... so this is outside auto-enrollment 45% of employees changed their medical elections from one year to the next. That means 55% of us don't make a change in our medical election.

Presumably, we like what we have from one year to the next. And what we found is that employees continue in their same election for three and four years at a time.

So that seems to support why we're seeing our client just continue people in their election from the prior year.

Now when I say election, I also mean if you elected no coverage the prior year that means that you respect their coverage -- their election from that prior year as no coverage. So that's what we're seeing.

In addition, the idea is that --if-- you have-- about 55% of people who like what they elected last year including electing no coverage, our feeling is that if these employees are required to go through annual enrollment every single time and opt-out even though they liked this past coverage, we're worried about the inertia of people being auto-enrolled in coverage that they don't want.

And so it kind of goes to the administrative burden of requiring people like myself who really like my husband's plan from having to take action every year.

Of course there are positive effects too in that you're getting people, maybe, to think about it. But we're seeing that generally people stay in their coverage because they are happy for three or four years.

Helen Darling: I think we have, at least among our memberships -- some make excuse about -
- would again -- argues the flexibility and (inaudible).

It's because there are... especially as costs have gone up and some health plan costs have gone down inexplicably. But people are not satisfied they may have moved to their spouse's plan, something like that, and they get enrolled and then they get upset if they are automatically enrolled.

But, maybe you could argue that they should have said, "I don't want it." That would be the preference but, and so it's most, as Jennifer said, most people are satisfied with that. They want balance, and that would probably be a better way to go.

But the flexibility also helps you deal with situations where the cost is high. There is a lot of change, highly transient community a lot of change going on.

So flexibility works for that too.

Joe Canary: Okay. So I think we're doing okay on time. But in the interest of time, our next two subjects are sort of related. So let me try to merge them a little bit.

But the next one is, if the current employee's benefit plan -- sorry -- if the current employee's benefit plan package or coverage is no longer offered by an employer, in which plan benefit package and coverage should the employee be reenrolled, is topic one, and there's a subtopic, and I think David was going to take the lead on that.

The subtopic was, you know, what automatic enrollment procedures are currently used by employers in a plan benefit package when a plan or when

coverage is no longer offered by the employers. Jennifer is going to speak a little on that. So I think we'll start.

David Johnson: Yes the question of the current plan is terminated then what plan does the employee get auto-enrolled into.

So currently employees... employers will give the employees the option at open enrollment for which plan they take.

So I think that would most likely be maintained under many, you know, going forward. The employer should really have that flexibility -- there is that word again -- to determine which plan they are going to replace the old plan with in terms of pushing someone in on an auto-enrollment option.

I just think it gets too complicated if the employer if it's dictated to the employer this is the plan that you're going to have to move people into.

Again, I think the employer ought to have ability to select the plan that makes the most sense for their workforce for people to be auto-enrolled. Even in the instance where the other plan was terminated.

Jennifer Henrikson: Okay and that's consistent with what we're seeing today with the employers at AON Hewitt. And that is so, first of all, today as I mentioned we have a lot of employers who auto-enroll. And when they have changes in carriers they have to deal with inflation.

And so what they do is, first of all, the coverage doesn't end until the end of the plan year. So usually it's a calendar year at January 1 as the start date. And so they start by communicating the change prior to or at annual enrollment -- they do the typical, "here are all your options. By the way, if you are in this

plan now, this is changing and here is what you will be enrolled in if you fail to take any action.”

And typically the way they go about mapping -- I'll call it -- mapping the plan is they, you know, it seems pretty standard. They go and they look at the cost of the plan, what the next network is and they figure out the benefits and they try to identify the closest plan that they can to the one that the individuals were are auto-enrolled in before, or are enrolled in.

And then at the end of the annual enrollment period, if the employee has failed to take any action they auto-enroll them into the plan.

Scott Kennedy: And that's consistent with our history -- when we changed plans or when we changed providers -- how we communicate it as well. And that is something I do want to reinforce.

If you think about the complexity of plans with 350,000 employees, that we're trying to communicate, everybody has the same plan option from the CEO to who's stocking the store.

And to be able to give them guidance to help them through this is a long process. So when plans do change over the communication well advance of those folks who are on affected plan, to let them know in advance and they have afforded that open enrollment period where we can just have one single (inaudible).

Joe Canary: And just a couple of questions. So back to maybe the first issue of the individual versus the dependent enrollment. So let's assume you're dealing with a change of plan then you're reenrolling the person who currently has dependent coverage.

And then you -- because they don't take action to change the plan -- you end up in an auto-enrollment circumstance. Would that be a case where you should be looking to reenroll them in dependent coverage and not enrolled in an individual coverage?

Scott Kennedy: Yes, as looking at that fact and from a change of plans that they had. Employee plus family and employee plus spouse -- it is the same number of dependents in that new plan, because actually all we're changing is the plan and how many dependents they want in the previous selection.

Joe Canary: Yes that seems to be generally the consensus. And if I heard it correctly, you'd go through this communication option, and there may be an evaluation to say which plan that's now being offered is really the most comparable plan to the one that is being used for auto-enrollment, or even if someone's enrolled in something that's being eliminated it, you could say there is a comparable plan for that year.

Is that kind of cross-walking what you're envisioning in an auto-enrollment environment? You'd say, "Look at the plan that they're in, and then look at what they're offering and automatically enroll them in something comparable."

Or would you have a communication program that when they didn't act, then you just auto-enroll them in whatever the single auto-enrollment plan will be using would be appropriate.

Helen Darling: Right and that gets complicated in the way you (inaudible). Again, in the simple principle -- simplicity -- whatever your fallback there is a default plan that should be consistent for the personal circumstances.

But if you -- if someone -- lost their plan for one reason or another, then they have the choice of picking another plan. If they don't, they're going to be put in the default plan.

But everybody knows if you don't act, this is what you're going to get. You can keep saying that over and over.

And you can't -- there are too many subtleties. So your idea -- in fact I bet if we voted on this with everybody here -- your idea of the next best plan and the closest plan may be very different from my idea. So even if we could agree, it's very complicated to do that.

Scott Kennedy: One thing might be helpful, too, Joe, is just to take how we as an employer we use our communications. So we have a new team start, we give them a package on day one.

If you become eligible in 90 days from now we will auto-enroll you in X plan that we decide -- the employer is what we want to auto-enroll people in.

That individual then has the ability to opt-out of auto-enrollment or say, "no, I want to auto-enroll. If I become eligible at whatever day in the future into this plan."

And as an employer we then have it on file so when they become eligible, that's what we auto-enroll them into.

We know from history that we only have a 40% [employee population] actively electing in. So for the other 60%, that would then be basically defaulted into the auto plan. And what we envisioned and what [employees]

get into so it won't cross over too much here is this: we give you a period of time after you've been auto-enrolled, all of 30 days as a starting point. Where electronically again to avoid administrative burden, you can then change what sort of coverage you have and the dependents you want to include in the plan based on the materials we send you out.

And if you do nothing, you stay in the plan we've auto-enrolled you in and you don't get your premiums back.

So if you come back to us two months later and say, "well I didn't want to be auto-enrolled." Well I'm sorry; we gave you coverage for that period you choose not to act on all the communications we sent to you electronically and by mail. And since we have a very fair process, then we go from that being, "do you want the employees (inaudible)-?" to then saying "okay, once a year in October for a calendar year plan, most likely, you look back for a 12 month period."

Okay, did you qualify and say same again the communications for you to then be eligible. You can make the choice yourself but otherwise, you know, depending on the history or election auto-enrolling will elect into this plan.

But that's how I would picture the set of communications (inaudible) going around this time.

Joe Canary: Okay, very good. Why don't we move to our last sort of topic before we open it up for telephone people and the audience that's here with us to ask questions or participate.

So, are there concerns that certain default options for automatic enrollment leave some, at least, having coverage that they do not want or for some

employees obtaining lower levels of health care coverage than they would have elected otherwise?

I think on this one we didn't have a specific person to start us off so whoever wants to take the lead, feel free.

Man: Yes.

Helen Darling: So if they don't make a choice when they've got a choice -- actually many times the choices aren't the best choices anyway. So we worry all the time about people not necessarily making the best choices for themselves when they make their own choices, and they even do acknowledge that it may not be the best choice. So you have to worry all the time about that. But it's across the board. It's not going to be just auto-enrollees.

David Johnson: And I agree with Helen. And so if there is -- and Scott acknowledged I think -- we would all agree that yes, there will be issues with people getting into a plan that they would prefer not to have. They have the ability to opt-out. What could you do to prevent that?

I don't know if there really is anything, as long as you're going to have to auto-enroll employees into a plan. I think it's just a given that there will be some people that'll get auto-enrolled into a plan that they would not prefer if they had really read the materials.

And I don't see a way to avoid that other than mandating that the employer define the best plan for auto-enrollees. And I just think that's too problematic for anyone to establish here are these set criteria an employer must use to define the best plan.

I just don't think that's feasible. I think it's just that it's an issue that we just have to live with it, and the people that have selected a plan that they might not actually want to have. They had their chance to opt-out.

Scott Kennedy: And I wholeheartedly support David's comment on that one. It is... any time you mandate something upon somebody; this is what people are going to get upset about. And you can't help people's choices or their lack of choice or lack of action in this circumstance.

Jennifer Henrikson: I would add that just that to some of the point that has been making here on the prior question. There are ways that I think limit what is happening.

Number one, I think we talked about dependents. If there is a rule that doesn't require that the dependents be auto-enrolled I think that would help minimize the people who are auto-enrolled who don't want the coverage.

And then I think the second place would be respecting someone's prior coverage after they've opted out one year -- not requiring that they auto-enroll, be auto-enrolled in a coverage every year if they've elected no coverage.

Joe Canary: That is it; I think we're just a little bit ahead of schedule. But why don't we move to the participation section. And I think, as with the first panel, we're going to alternate between people here asking a question or giving us their view.

And then go to the phone as a second approach. So do we have anyone here who is interested in asking a question, making a comment?

I see no rush to the microphone. Okay so we will go to the operator. And operator do we have anyone in the queue online?

Coordinator: Yes. If you have a question please press star 1 on your touch-tone phone. Please unmute your phone and record your name and your organization at the prompt.

Our first question comes from Chris Brockmeyer. Go ahead sir your line is open. Please state your organization.

Chris Brockmeyer: This is Chris Brockmeyer I'm with the Broadway League, the Director of Employee Benefit Funds.

Broadway League is a trade association that represents commercial theatre owners and producers. And I sit as a trustee on nine distinct health funds in multiemployer health funds in the industry.

The question or comment that I have has more to do with initial coverage -- so called full-time employees should be given.

There hasn't on this topic been a whole lot of conversation regarding how to deal with multiemployer plans. And it's worth pointing out that most multiemployer plans have -- certainly all of those that I sit on in the entertainment industry -- have eligibility criteria that are directed more at wages or contribution levels that determine whether an employee gets single or dependent or family coverage.

And is not necessarily a matter for the individual employer to determine or anyone else to determine.

And I think that's something -- that the -- that the regulations need to deal with in the drafting process.

Joe Canary: Excellent point. Any of the panelists want to speak to that at all?

Helen Darling: Another argument for flexibility.

Joe Canary: Okay. Well, we obviously would appreciate your input on that subject as we move forward on evaluation of this. So it may not be - if someone in the audience is interested in asking a question, give me a hand signal. Otherwise we'll just continue with the phone, because this time we have more people on the phone.

Operator do we have another person?

Coordinator: Yes, our next question comes from Lisa Eacker. Go ahead, your line is open. Please state your organization.

Lisa Eacker: This is Lisa Eacker with Jefferson County School District and I have two points that I wanted to bring up. First, we do just a monthly payroll, and we actually withhold benefits deduction in advance in the month of coverage.

So, for somebody to opt-out we would need to have enough time to be able to process with our payroll schedule, and so I would be looking for something that gives them a little bit longer period of time. And obviously, the cafeteria plans would have to be amended to have these kinds of status changes during the year.

The other point that I wanted to make is that we have a significant portion of our insured population that is in a Kaiser HMO product. But we also have a vocal part of our employment group that wants to have an alternative plan.

And we've been challenged to be able to offer that slice business outside of Kaiser because of the discrepancy in the rates and the enrollment.

And when we're looking at having to automatically enroll, I could see this as a death knell for having anything other than just the one vendor. We would be interested in your thoughts on that.

Joe Canary: Could you elaborate a little bit on why you would think that would be the death knell?

Lisa Eacker: We already have trouble with the insurance carriers not wanting to do slice business with Kaiser. And we got 80% of our population enrolled in the Kaiser HMO, 20% in the non-Kaiser option. And there is quite a difference in the rate.

So if we look at enrolling folks into the most cost effective plan for the school district, which cost is a huge issue for us right now and will continue to be, it just forces all the enrollment there. So why would that non-Kaiser vendor want to continue to do business with us?

Helen Darling: The higher one.

Lisa Eacker: I'm sorry?

Helen Darling: Which is the higher one? You said there was a big difference in cost -- which is the higher one?

Lisa Eacker: The non-Kaiser.

Joe Canary: Any of the panelists have a reaction you'd like to add?

David Johnson: I would just have a question for Chris. Would your preference be that you have the ability as the employer to determine which plan you auto-enroll people into?

Lisa Eacker: Well yes, I certainly think so. However, being realistic I would look at us having to go with the lower cost plans.

So in essence this would force us to take, probably end up taking choice away from our employees and forcing them into one vendor plan.

Helen Darling: They still have a choice. They have a choice to enroll.

Lisa Eacker: No because it... my concern is that the non-Kaiser business will walk away from us. That has happened already before.

David Johnson: I'm trying to understand Chris' point that you're going to get residual. By getting more people into the Kaiser plan, you may well lose the other plan. And I just don't see a way of avoiding that.

I think that's an issue that is independent of the -- I mean, if the auto-enrollment ties to that, but I just don't see how you would avoid that scenario as long as that other plan is going to take that stance.

Helen Darling: But it sounds like she wanted to put them in a lower cost plan. If that they can get more.

But that is a common problem especially if you have small group. How small is it?

Lisa Eacker: We are actually a very large group. I wouldn't say very large, but we are over 10,000 benefits eligible employees.

Helen Darling: In one area you only have those choices? Where are you?

Lisa Eacker: This is not uncommon, because there are really about four large insurance carriers in this area. And we've attempted to work with a number of them, and this is common.

Helen Darling: California?

Lisa Eacker: No, Colorado.

David Johnson: Well I would go back to some of the other panelist that have talked about the communication too. Because that's, you know, you still maintain the ability to communicate with your employees about their options. So to the extent you want to encourage people to look at both plans, you can still do that.

Lisa Eacker: That's true as long as we have the option to offer -- that's the piece that may likely go away.

Helen Darling: In some markets, I don't know about Colorado, but in some markets Kaiser is actually offering a consumer directed health plan. So maybe with 10,000 employees you can talk to them about that.

Joe Canary: Okay, well I think as we move forward, we'll obviously appreciate your input on that. And to echo something that Dan Maguire said to the first panel, we are always interested in solutions.

So if you think you have some ideas that would be helpful to solve the problem we obviously would like to hear those too.

So if you do have someone from the audience who'd like to participate -- so why don't we go there.

Jackie Abbott: My name is Jackie Abbot. I'm with the ExxonMobil Corporation, and what I'm interested in is I'm not really practiced enough on the FLSA, per se, but will the choice of the option be a fiduciary decision which could be challenged under ERISA?

That's something that I'm concerned about, especially as raised by the last question, because if you pick some of those options, could it be challenged then as a fiduciary decision? And I'd like clarification about that.

Joe Canary: Okay. Let me go back to what Dan said at the beginning of the first panel as well. This may not be an opportunity where we're going to be answering questions. We're trying to get your input and identify issues that we think you should look into.

I don't know if you have a view on what the answer should be that you'd like to offer up as part of this discussion, or you just want to raise that as an issue to be sure considered.

Jackie Abbott: Just for consideration.

Joe Canary: Thank you very much and then we'll consider that.

You're not on the microphone, so I'll say the person asked what have the panelists thought about that as well. So if you all have any thoughts...

Helen Darling: Well, when I was at Xerox we had to make a decision on every market every year about the plans we offered.

So you always have to make a decision that is going to be defensible based on evidence, data, a process, et cetera. So I don't see that this is any different.

It's, you know, you would want to be sure that you made a wise choice. And that it was done in a way that all the other plans selections that you made because you'd be making -- I'm sure ExxonMobil -- you'll all make decisions all the time around the world.

Now under ERISA, those decisions are going to be made, and you, at least, in theory, you have to defend those decisions. And I can't imagine that you would probably have much problem with that because you probably do it very carefully.

David Johnson: I think Jackie does raise an excellent point. And I think that that just reinforces the need for the regulations as the details come out for there to be a wider area that is acceptable for the employer to act within.

So rather than narrowing that and saying, you know, employers must make this type plan the option, I think that's where it gets tricky for Jackie. If there is a certain criteria the plan has to meet, then that makes it harder from a fiduciary standpoint to maybe back up why you made that decision.

I think if it's broader, you know, then the employers have more latitude and have the ability to fulfill their fiduciary responsibility.

Jennifer Henrikson: And I'd agree. I think that supports the idea of there's a floor of what an employer has to do. But beyond that, the employer has flexibility.

Joe Canary: And so operator, I'm not sure if we have somebody else on queue for the phone...

Coordinator: I am not showing any questions at this time.

Joe Canary: Okay. I think we're actually pretty much a little over schedule but more or less on time so I think that this will bring this panel to a conclusion.

I'd like to thank the panelists and everyone here for participating. At this point I think we're taking a 15 minute break for the beginning of the third panel. And the operator -- if possible -- if you could put people on mute again and then start up again after 15 minutes.

Coordinator: Certainly.

Man: Thank you very much.

Coordinator: We'll do a 15 minute break. Please standby for the third session.

Janet Walters: I did ask that they cool off the room; hopefully that helps a little bit. We have most of the same folks up here on the government panel, but I'm Janet Walters, the Senior Advisor in the Office of Regulations and Interpretations. So we have the same government panel here: Amy Turner, Paul Mannina, Chris Cosby, and Joe Canary as well.

But let me introduce our panelists from the private side who graciously agreed to come here and share their thoughts on a Friday afternoon.

So to my left is Randy DeFrehn. He is the Director of the National Coordinating Committee for Multiemployer Plans.

Next we have Jackie Abbott, Supervising Tax Council in Compensation and Benefits at ExxonMobil Corp. Then we have Belinda Kitts, who is the Vice President of Human Resources for Ruby Tuesday.

And Dania Palanker is the Health Care Policy Coordinator for the Service Employees International Union. So welcome, thank you.

We are focusing here in Panel 3 on the adequate notice and opportunities to opt-out requirements under these automatic enrollment provisions of Section 18A of the FLSA.

So focusing first on the adequate notice in that provision, I'm going to ask the panelists to share some thoughts on what standards they think should be developed for that employee notice requirement.

Belinda Kitts: The notice should be very clear in the language, that this will be a very new thing for a lot of the employees. And so it's very clear and easy to understand information.

I think it should include what the plan is, what the premium contribution will be, and the frequency it'll come out. And also include what the opt-out process is so they know that right up front.

And I think in the information on the individual mandate should be included as well, so they understand that it's not something that the employer per se is making us do, but they get a clearer picture of the overall program and everyone's responsibilities.

Dania Palanker: I would second all of that. A lot of it was what I was going to say. I want to add a few things to it. Obviously, there needs to be the fun side, determination that I do have some, this is pulled out of a box, but that we don't want something that's 8-point font three pages long that people are never going to get through. Or even something that is hidden, you know, on Page 10 and/or in the middle of an SPD, but that it is something that people will be able to see.

It needs to be provided in a linguistically appropriate manner. It doesn't help this notice if it's in English and it's not an English speaking population, your workforce.

I would also just argue to recognize the fact that there are many employees who not only have limited health literacy, but also limited literacy in trying to work out. It's not necessarily going to be health care language that might be confusing. It may just actually be some language that is confusing to people who do have limited literacy added to that.

Ideally there would be a way for all employees to be able to talk to somebody about this, whether it's, you know, a phone call to HR benefits staff member or something. So if people don't understand this process they can get answers to it and that is provided in the notice.

We would also argue that the Section 1512 requirements to inform employees of coverage options be provided at the same time. It really isn't helpful if two

months after they've had the opportunity to opt-out they find out about these exchanges, particularly if the plan is under 60% of actuarial value and which is pretty much that they are under 400% of poverty guarantee they'll be able to get that subsidy.

Although not related to notice, we could also argue that perhaps people shouldn't automatically be enrolled in a plan that is under 60% of actuarial cost.

And I -- we -- would also really find it important to think about how the notice is provided. So it's provided in a way that guarantees delivery.

The first panel spoke some about mailing. Mailing sometimes works, but a lot of times it doesn't. We've had some low-income populations in our funds that where over 30% of the mail is returned because there is so much moving going on. And you just can't depend on it.

At the same time, with a lot of work forces out there, everyone doesn't go to work in one big building everyday where they get their mail in the mailbox or can go to a desk everyday.

And it is a struggle to figure out what will work for, say, janitors who work in buildings all across a city. Or home care workers who work in peoples' homes, and now that we have direct deposit people don't have to go into their employer once every two weeks to pick up that paycheck and they never connect. So it's a struggle to figure that out.

We would encourage that Departments actually look into whether there is something that would work that wouldn't be too administratively difficult, where there is some kind of active recognition (inaudible) for people.

So that we know people are actually getting these. Or even if it's some way to try to make sure for these difficult to reach populations that we know workers are actually getting those notices.

Because overall, I think, SEIU thinks these provisions are really going to help to extend coverage to some workers who may not have really had the ability to enroll.

There are great employers out there. There are unfortunately some employers who don't encourage enrollment in the plans that they offer.

And this can really help, except it really does depend on that notice being there as (inaudible) people can make that educated choice to opt-out if necessary.

Jackie Abbott: I would like to -- is this on? Yes. I would like to reiterate the other two panels about giving us flexibility, certainty and a long lead time.

In the past, the Department of Labor has provided safe harbor notices. I think if we had a safe harbor notice but had the flexibility to tailor it for our workforce, the majority of our new hires have graduated from college and have advanced degrees.

And so I think that our notice would be completely different than Ruby Tuesday's notice. We would like to deliver it electronically, pre-employment with the documents that we give new hires that have to complete prior to the first day of work. Thank you.

Randy DeFrehn: Okay. I'd just like to pick up on a couple of things that were said by some previous speakers. And one in particular is Chris Brockmeyer made a point at the end of the last panel. And to preface my remarks by saying, you know, looking at the multiemployer context, you can find an exception for every rule in that world.

But, you know, broadly speaking, multiemployer plans are supported by employers who wouldn't normally be subject to this rule. Because normally the small employers, under the definition of the SBA, 500 or fewer -- there are micro employers with probably 90% of them under 20 employees.

So, you know, having said that, I also think that it's important to recognize that for those employers who contribute to these plans, the idea of having to provide a notice for an enrollment -- an automatic enrollment -- is unnecessary because this is a... it's a choice that's already been negotiated between the union and the employer.

That is the automatic option. These plans are -- everybody covered on this that are essentially automatically enrolled.

And the only time an opt-out would be appropriate would be if there are certain types of individual contributions requirements if necessary if you take that coverage.

Janet Walters: Just a couple of follow up questions. I think I heard was it was Jackie asking for safe harbor; in essence a model notice. But again asking for flexibility to go to tailor as needed.

Jackie Abbott: Yes.

Janet Walters: Okay.

Janet Walters: And I then I think I heard also some of the issues with the distribution of the notice. Mail on one hand was -- I think I got it right Dania -- was not reliable. There are issues with mail, but there are also issues with not every worker coming into an office.

So again, it seems like we have a variety of issues to consider with concerns to be taken into account the different population of workers. I also heard electronic distribution recommendation from Jackie.

Chris Cosby: I want to reference Jackie's statement that this will be included in the new employee package (inaudible)?

Woman: Especially given the time requirements - that we'll probably talk about a little bit later. I think the employee is going to have to know when that clock starts ticking very soon. So I would say we would be right with the new hire information.

Joe Canary: Just -- I have two questions. On the concerns that you expressed about people not getting mail or maybe not having a central location where they got mail in the office.

So what alternatives are -- do you think would work in that environment?
More by hand delivery kind of a process?

Dania Palanker: I honestly wish I had the perfect answer. And it's not easy in that I don't know if we've seen the perfect example for all workforces.

I mean for a homecare worker who works for an agency but may only -- may never go into that agency really after that first hire. I mean, obviously if there is a first hire and there is something that they have to come into to sign forms when they're first hired, that's a great opportunity, I think, presented.

But if you're talking about some kind of notice on a yearly basis with the annual enrollment, I don't know if that can be accepted. You obviously can't send someone out to thousands of homecare workers' home or their clients' homes, which is why in those cases, perhaps, where someone doesn't have that contact there can be some kind of confirmation of receipt in some way.

I admit I don't know if that will work. It would sort of be an ideal, I would say, to have something so that we know that people have actually received these forms.

And perhaps if it can't be done with every person signing something then sending it back -- because then obviously you're dependent on that and follow up. Perhaps there can even be ways of, for at least the larger employer, conducting some kind of surveys when the program starts.

At least just to make sure that they are providing this in the way that people are getting it and be able to adapt if they are not actually getting it to the workers.

Joe Canary: Okay. And then one more on the linguistically appropriate. We have current rules in the summary plan description environment where you look at the largest (inaudible) employers from different thresholds and you end up with these segments of the population literate in a particular non-English language.

That SPD then has to have a notice in that language written providing them directions on where they can get assistance to read and understand the SPD.

Is that kind of approach something that you think that works? Or it's more something translated what you're thinking about?

Dania Palanker: I would ideally say something translated, especially since we're talking about a notice which isn't going to be nearly as long as an SPD, and therefore shouldn't be thousands of dollars to translate. Especially if there is a model notice, and if that model notice can actually be provided, you know, to be translated to employers in a number of more common languages in the country that would I'm sure help with employers as well.

And there are going to, obviously, be different concerns if you have two languages. It's a lot easier if we recognize that if you have 20 different languages on the books in your workforce that things may not be as simple to do that, and we don't want to send someone a package of 20 things in different languages.

Joe Canary: Right.

Dania Palanker: But I think the ideal should at least be those top languages, to be able to have something translated if it's one page or half a page.

Amy Turner: Something that is maybe worth pointing out to make sure that people understand some of the rules that are out there in addition to the SPD rules. There were some rules for "culturally and linguistically appropriate" standards that this Department put out as part of the appeals rules.

We've gotten comments on that, and there will -- the class language "culturally and linguistically appropriate" also comes up as part of 2715, the summary of benefits and coverage, which we had not yet put out an NPRM. But as people see those rules and some of the different options, it would probably be useful for us to hear from you whether or not we use class standards that you're suggesting should be coordinated with those or a difference in those. Because there are a couple of different requirements out there for class.

Man: I was curious, are you now providing the material translated?

Dania Palanker: Well I'm with the union itself. I've worked on some of the union funds, in which case we did translate -- everything was translated to Spanish for our workgroup.

We had for our workforce, and we did have a group in Minneapolis that we translated a lot of material to Somali because there was a lot of Somalis population in there as well.

Man: It is certainly typical that, where you have a population concentration in a language other than English, that would be done. But the biggest problem is that for those people -- by the way if they are illiterate in English, that they are illiterate in their own language.

So putting it together in whatever language, it's still not going to get the message across, and that's part of the problem -- trying to explain to people (inaudible).

Janet Walters: Well let's turn now to our second kind of focus here on the employee's opportunity to opt-out. And if you would share a little bit about your thoughts

on what the latest date that an employee should be able to have to be able to opt-out or to change their coverage after the automatic enrollment.

And then the second part of this question is, you know, how far in advance from that date, whatever that length of time is to opt-out, how far in advance should that notice be provided?

Belinda Kitts: This is where, depending on the employer, that comes into play quite a bit and the type of plan.

We have self-insured plans, so it would be easier for us to work on a tighter timeframe of notice on someone who wants to opt out.

Some -- a lot -- of people though, have fully-insured plans, and you usually have to pay for those a month at a time.

So it would be harder for that type of employer to work on a closer time frame. And also, your payroll frequency will come into play there too.

Where we heard earlier, the individuals were paying a month at a time. They would probably need a good 45 days in advance of that payroll run to have a clean payroll there and not take the deduction.

In our situation it would -- we would have to change our plan design; we make ours immediately available on the date of hire.

We're going to have to institute a waiting period so we can actually give people time to, you know, opt-out if they wish to opt out.

Jackie Abbott: Currently we give employees 60 days from the date of employment to elect what option they want. And depending on the location, they may have up to six options because we're based on regional.

And, if they elect during the first 30 days, it's retroactive to the first day of employment. If they elect after the 30 days, it's the first of the month following receipt of the election.

I talked to our folks. And what we talked about is wanting to allow our new hires to opt-out prior to the first day of employment and then give them their standard right to elect in the first 30 days.

That way then, what we were thinking is, is that somebody, after they have started their job and settled in, they can look at the options available -- all the electronic (inaudible). They can make that decision -- they can maybe shop for a doctor even to find out where that network doctor is, and then they can enroll.

And that again if enrollment is in the first 30 days, it's retroactive to the first day of employment.

If you come out with rules that require us to put individuals in a plan effective the first day of employment and then they opt-out, I think we would like clarification that if they use benefits that they have to pay for it. And it wouldn't give rise to COBRA rights. That was another concern.

If someone -- say we put somebody in a point of service option and they use it, and then 20 days after they start they said, "oh, my wife has gotten a job now we don't need the coverage and so I'm opting out."

Of course we'd let them opt-out anyway because it's the change of status. But let's ignore that -- okay.

And so they basically say, "I'm opting out," so we said if you used the benefit you have to pay for it. But we also don't want to give them COBRA rights if we can get away with it. Because we have to pay every time we have to send somebody COBRA to our COBRA administrator, and it gets expensive. So that's our ideal world.

Randy DeFrehn: Something that you had just tried to nail down earlier in one of the earlier panels as far as eligibility periods, contribution periods and then benefit period.

If you look at the way our plans are structured, the contributions are usually due 30-- by a stated specific date -- say the 20th of the month following the month in which the hours are worked.

Then you need a period of time to post those hours to determine the eligibility and then that person needs to have, if it's a self-payment situation, they need to have an opportunity to make those self-payments.

So basically, you're going to have at least a two month lag between the period in which the hours are being worked and the period in which the eligibility or the benefit period start in order to get all -- everything -- processed and allow the individual time to get the (inaudible) contribution. So it's really a longer eligibility period.

Dania Palanker: One important issue is, you know, we do want to be able to have as long. You know, have a period that's long enough for people to get the information to understand it; to research, you know, what the plans are that are available.

Also, to research if they are eligible for a subsidy on the exchange -- to be able to research that option as well.

We also don't want something that forces employers to institute a waiting period if they don't currently have one.

The law allows up to 90 days. There is no reason why every plan has to -- there could be some plans that do have to -- because it's just... in order to get all the data, but if there is an employer that can do it right away -- we don't want to have to change that.

So I think it's really important to think about how those interplay together and I understand that it makes it more difficult if there is not a waiting period, or if there is a shorter waiting period, to have everyone opt-out before that first payroll deduction.

But they are also, in an ideal world, everyone would. No one would get a payroll deduction that they didn't want because they didn't want that payroll deduction.

In some cases they actually could be the difference between whether they could pay rent that week or whether you can buy food that week if you have \$100 taken out of your check, which is really important, and we do want to prevent that if at all possible. But we don't want to prevent that by forcing people to go without insurance for a period of time.

And I also add to, that there is a part of me that says we should not close a fund administration at that point, because I know everyone says a fund administration would hate this idea.

But from a consumer standpoint, when we talk about the issues of the fact that there are people that have literacy problems who are not going to be able to understand that notice, there are going to be people who don't know they have the right to opt-out and will be automatically enrolled until they get that first paycheck and that money is taken out.

And 30 years from now, I am sure everyone is going to know this is what happens when you get a job and if they offer healthcare; it's automatic. Just like we know if you get a job you're going to have to have your social security taxes taken out.

But over the next few years after [implementation], people won't know that. And there is a real problem when you're talking about someone who is a low-income worker who really may not be able -- who is living paycheck to paycheck -- and may not be able to pay those bills if that money is taken out.

And what happens if they are suddenly locked into that for 12 months because they didn't understand the notice?

Amy Turner: So, just a follow up question about the waiting period. The waiting period that you impose would just be for individuals who were being auto-enrolled? Or it would be across the board for everyone?

Dania Palanker: I think to keep it administratively clean it would have to be across the board for everyone.

Janet Walters: So we're already starting to touch on some of the topics in the following questions. So it may start to look like a big blended discussion and don't hold yourself back in that regard.

So you've already mentioned you know, premium withdraws and so that immediately brings two questions down. We're going to talk about refunds and the issues there.

But before that -- I think first with that -- the next question is about the costs and burdens, I guess, on these employers in establishing any procedures and operations to disenroll to permit this opt-out.

The cost and the burdens. I've already heard the idea of premiums withheld. And I don't think we actually addressed refunds but, whatever flow works for you. I'll turn that over to you now.

Jackie Abbott: Well I did talk -- I did have an opportunity to talk to our administrative folks, and basically they informed me that the programming changes that would have to be required to make this as seamless as possible could take up to 18 months.

And you know we are not an IT organization, so we contract everything. And I have no idea what the expense would be.

But they said that if I thought that this was going to happen, they wanted to have it on their work plan possibly starting this September -- so...

Chris Cosby: Did they say what stuff was involved or required to the process to make the programming changes to the process?

Jackie Abbott: Well I think there are a lot of other priorities, too, that go into effect. And right now, you know, they are looking at how to report W2's with health coverage. And so there is a lot that goes into you know, disenrolling.

Right now it's an annual process, and so if we automatically enrolled individuals and someone comes in and disenrolls, what they want to do is they want to have what we have is an employee direct access system. So, I go into the intranet and I make my election and there.

I can't back out...

Chris Cosby: Right.

Jackie Abbott: And so what you'd have to do is you have to give the employee the ability to go onto the intranet and then back out that election to opt-out. And so that is the program change that they would have to make.

Janet Walters: I think we did have someone attending by phone who brought up the idea of refunds earlier. So have you all thought about this? Even should employees be permitted to have a refund of their premium? Timeframes that you would put those perimeters around?

Belinda Kitts: Well there would be some difficulty there. Whether or not any coverage was used during the timeframe to determine whether or not a refund would be due.

As well as there is administration costs that go along with that, and tell how long you know, is it a monthly that we're trying to do? Or that's two or three months later?

So that would be difficult as well from my perspective -- not only giving them refunds but actually taking premiums is going to be a huge administrative challenge because half of my workforce are tips employees. Tips minimum wage in those states is/would be \$13 per hour. So the paycheck that they are

getting today may or may not cover taxes. So a lot of them have zero paychecks already.

With an automatic enrollment where you're required to pay a premium contribution, that puts us in the position of, "do we bill our employees for this coverage now that we are automatically enrolling them in?" And then, "how do we collect that money?" They lose their tax benefit for a pretax deduction because they are actually paying it back to us.

In many states we cannot, you know, every night their tips are cashed out they take that home in cash, so that's why it's not on the paycheck.

In a lot of states we are not permitted to touch that money in any way. So just taking the premium for our half of our population, we really are not sure how to do that right now-- how that will be done.

Woman: What's the employee premium contribution? I'll just tie it up to the max how big the premium would be in the employee contribution (inaudible).

Belinda Kitts: Well today we have some limited medical plans and those are anywhere from \$7.00 a week to, depending on the type of plan they choose, maybe \$25 a week. And just on that, most of them are in a situation where they have difficulty making those premium payments.

Amy Turner: But I'm just thinking \$7 a week. Are they mini-med plans?

Belinda Kitts: That is indeed a mini-med plan - yes.

Man: What is the employee population now that covers the mini-med plans?

Belinda Kitts: Currently about 20% to 25% of that population. But we are also very high turnover population. 110%. So that's the constant. Just administratively, sending that many notices out, opting in and opting out, trying to refund money, just on administration alone that will be a huge amount of time and people.

Dania Palanker: From my time when I did fund administration for SEIU funds, I do understand that a lot of employers will have difficulty, you know, their systems may not right now be set up for that refund. It's sort of something we (inaudible) with when someone is mistakenly enrolled anyway or another action happens that's, you know, and you do have that issue with multiemployer plans -- similar to if you have a fully insured plan that you're paying where, you know, it's that employer. I believe if there is a refund, we'll probably have that responsibility to refund.

But added to that, for low-income workers, if there are going to be refunds -- if there is any way those refunds can be in the regular paycheck versus in a separate check, it can be a huge difference to somebody who may have to pay \$10 every time they cash a check.

And it's just an issue to remember what's out there with low-income workers.

Jackie Abbott: I don't have a high turnover, fortunately. I'd say the average age of our employees last I checked was 43 with 18 years of service. Which if you add that up, that means most people started work at 25. But 90% to 95% participation in our plans have an 80-20 cost share.

The problem -- we have a couple of problems with refunds. One is you automatically have all contributions done on a pre-tax basis. So we would

need some kind of clarification under the pre-tax rule for... to be able to do that refund.

The second problem is we have for the fully-insured options -- we have a law on taxes that does not allow us to get the money back from the insurance company.

So really, you know, you think about an insurance company when they help a hospital if someone is covered. You know, it's very difficult for that hospital to go back now and say, "oh, well that coverage should have been cancelled," you know, to tell it to the hospital by the insurance company. And so that's been enacted.

So when we collect the employee contribution and remit premiums to the insurance company, we will not get that money back.

Randy DeFrehn: I would say it would be reasonable. I wouldn't say it would be reasonable to get a refund on anything when it's come to (inaudible). From a prospective basis it makes sense perhaps you collected three months' worth of premiums.

If a person tells you midway through the first month that they want their dependent coverage cancelled, then I can see having a refund on the next two months, but it's certainly not appropriate for what's already taken place.

Jackie Abbott: Under SB20, we can't get the refund even if no services were provided. Once that premium goes to that insurer it's gone.

Randy DeFrehn: Well I guess the question is, are you paying three months in advance, or you're paying one month in advance? It depends on what you withholding from the employee, versus what you're giving to the insurance company.

Jackie Abbott: Well as we collect that we remit it to the insurance company.

Randy DeFrehn: I'd change that.

Jackie Abbott: We can talk later. There are complications if we keep it for longer than three days -- so...

Chris Cosby: Belinda and Jackie, neither one of your companies do automatic enrollment right now is that correct?

Woman: Correct.

Chris Cosby: Okay. And then I just had another question in terms of cost. Because you talked about systems costs, I was wondering -- because that's what I have to do -- what type of other cost would be involved? I mean, is this going to go to the same, I guess, go through the HR department for the same people who are administering this program that administer new employees when they come in open enrollment? I guess they'd need some training...

I'm just trying to understand... And what's the level of personnel that's actually involved in the process?

Jackie Abbott: I'd say that -- I walked across the hall and talked to the folks that do the hiring. In fact, I went to them and said, "okay, what's your new hire package like? What would you do in order to provide this information?" And I think the person that I talked to has a Masters in human resources; I think most of the folks do.

And he basically said, "Attached below is an example of a pre-employment communication that we send from our applicant tracking system known as brass ring. If you have additional questions about potentially leveraging this system to address component and health care reform you explained to me, we need you to contact another person."

So even that, adding that into the pre-employment package, involves a program and system change. And I think it's a system we buy from someone else.

Again, we don't manufacture those systems -- we have to rely on independent IT organizations to provide those to us.

Belinda Kitts: You know, you're correct. There will be our applicant tracking system will have to be modified to include some of these notices.

And that new hire onboard system is what we have. And then there will be a lot of -- we're in over 700 locations across the country, so there will be a lot of train-the-trainer type things that will have to be produced; videos and computer based training modules and things like that so that a restaurant manager will know when they hire someone what the processes are as far as explaining the initial part of it.

As far as the payroll deductions and the refunds and that type of thing, that would all be done back at our corporate office. And a lot of that electronic is in file feed. But it will take a lot of human interaction there to, you know, increase phone calls for employees and from our help lines and things like that that we have established already.

So we are looking at -- I can't tell you right now -- that one additional head?
Two additional heads? I'm not sure at this moment what it is.

Jackie Abbott: I'd be more than happy to try to talk to our folks and get you more specifics, you know, more specific details if that would help.

Because I know that you know, those are the things that they think about and they put on their work plans. And you know, it's you know, whenever I go to them and say, "well this is what you have to do this year," it's like "it wasn't on our work plan, can we defer it for a year? We don't have the budget for it. And when did you tell us it's legally required?" And among a few other things that we're doing.

Woman: Okay.

Jackie Abbott: So I'd be happy to do that for you.

Janet Walters: So maybe I'll just come back and drill down a little bit more about regarding the question of the latest date that an employee could/should have to opt-out of the coverage.

And I think a couple of you all have said once the coverage is used they shouldn't be -- employees shouldn't be -- able to opt-out. I got that right.

And - but other parameters that you see you know, do you have any timeframes for these numbers that you might want to share with us? The latest date.

Belinda Kitts: Well in most other areas of the Section 125 plans we give them 30 days. So if it's 30 days from the date you have they need to add to this plan or 30 days from, you know, having being married or divorced or whatever.

So I really think in consistency keeping with that 30 day time period would be more easily explained.

Amy Turner: Do you mean 30 days from when the person is enrolled or from when they see the salary deduction on their paycheck? When would the 30 days run?

Belinda Kitts: Technically from date of enrollment.

Amy Turner: I'm just wondering, to the extent that some people might only get paid monthly, would they be running at the same time and maybe as soon as they look at their paycheck they call and that was a 31 day month? I'm just you know, trying to figure out how this would play out.

Belinda Kitts: Had quite a discussion earlier, too, as to how many people will actually look at their paychecks. Since they're electronic.

Janet Walters: And again this is kind of our final question about current practices which you all have shared a little bit. But Dania, did you get a chance for some thoughts on current practices in auto-enrollment?

Dania Palanker: Yes, I spoke with some of our local union and some of the Taft Hartley funds we're affiliated with to try to find ideas of what they do. Most often when there is automatic enrollment, there actually isn't employee contributions for our plan, which I think makes all of this a lot easier because there is generally really not a negative impact on automatically enrolled.

You get free coverage. There is -- there are -- some other instances, but generally we've got a few funds where there are -- there may be a small minimum contribution, say \$20 a month.

Remembering that this is something that's been bargained and pretty much, you know, the money was on the table and it was part of, you know, perhaps salary was a little larger to have that \$20 a month and it was really that the employer wanted to show there was an employee contribution towards.

And a lot of the -- a lot of the touchups, because they are bargained in that way, there may not be an opt-out. Or there may be an opt-out only if they can provide proof of other coverage. Because the union has really tried to bargain to get people access to coverage.

The other place where we've see some interesting things is where there is primarily employer-sponsored plans -- where we represent security officers. They generally -- there is a larger trend in a lot of security companies where there will be a cash payment but not paid health insurance.

In some instances this is because a lot of people actually are retired police officers or retired from other jobs and they actually already have retiree coverage in some form. And so they don't need this second coverage.

It's something we've also seen in some areas where there may be a local living wage ordinance. Or perhaps a contractor-type living wage ordinance that actually requires either a contribution to health care or an additional contribution to wages.

And we've got some groups that we represent who work at an airport in San Francisco where they get, sort of, they get between 50 cents to up to a \$1.50

an hour for not taking coverage. The employer cost of coverage is between \$374 and \$438.

So they definitely -- there is a larger dollar value associated with the health insurance. And in these groups there is about 25% to 50% of opt-out at the same time, although I don't have the specific data.

The proof to back it up -- the union rep has told me that there really are primarily, everyone we know of is turning down health care, and that group does have another form of coverage.

Janet Walters: It's a very specific employee population you are talking about there.

Randy DeFrehn: True. The contribution rates are that negotiated employers are required to make contributions to the plan based on hours of service; there's no direct connection between that and eligibility.

The employer doesn't even know what's on between employers (inaudible).

Janet Walters: So it looks like it's time now to open this up for a broader comments and questions from the audience.

So maybe we'll start with the phone. Are there any comments or questions from the phone participants?

Coordinator: We do have a question, and that question comes from Chris Brockmeyer, and please state your organization. Your line is open.

Chris Brockmeyer: Hi it's Chris Brockmeyer again from the Broadway League. I just want to, again, obviously speaking more from the prospective of a multiemployer universe than a single employer universe.

First of all, I think we need to be very, very clear and very careful about what we mean by the definition of "opt-out" with the multiemployer context. As Randy mentioned, employers make contributions on behalf of individual employees and they become eligible according to wages or contributions earned and established their, their eligibility that way.

Now usually when we talk about an opt-in or an opt-out, it is brought about as a result of an employee self-pay that may be due.

Now if we're talking about within the context of this question here, whether or not an employee receives a refund for that self-pay or they choose to opt-in or opt-out, I don't necessarily see any major problems in that area.

However, if we're talking about an opt-out possibility that is affected through a collective bargaining process, for example, or if alternatively there is a single -- in some cases, a single employer's contribution to multiemployer plans if there is a trade association associated with the multiemployer plan, or the union itself or the fund.

If individuals, either through the collective bargaining process or self,-- single employers are allowed to have individual employees opt-out that could potentially be creating adverse impact situations on the multiemployer plan.

And as a fiduciary and trustee, I would be very concerned about causing otherwise healthy employees that are helping support the plan to opt-out and being detrimental to the plan over the longer term.

Janet Walters: Okay, thank you Chris. Anybody here in the room want to share any of their thoughts or concerns or ask us a question?

Jackie Abbott: At lunch today we talked about how enforcement of this provision will now be handled.

For example, will someone follow the FLSA provisions where they file a complaint? Investigations? And what will be the remedy? Will someone's benefits be paid? I mean because that's not an excuse. I mean, or will they be put in the plan? And so we were sort of musing at lunch that we'd like a little bit of clarification about that at some point.

Janet Walters: We hear your request. I don't know that we have anything to share.

Jackie Abbott: I appreciate it.

Janet Walters: Probably it would be fair to note that the -- there are no enforcement provisions tied to that -- to this automatic enrollment provision. So your other, you know, the other issue we will think about.

Jackie Abbott: Yes, well, I assumed it would be this enforcement will default under the general FLSA enforcement provision unless otherwise told.

Janet Walters: Okay we have a question here in the room.

Paul Dennett: Hi, Paul Dennett from American Benefits Council. In the last panel there was a discussion about the possibility of issues on auto-enrolling -- that the dependent could have already been enrolled in a high deductible HSA plan.

And that you inadvertently put in a plan that would disqualify them from a contributing to the HSA.

But there is sort of a variation on this that both folks from the Treasury and IRS may need to deal with, too. Where it could be the employee who is already enrolled as a dependent spouse in a HSA high deductible plan that fails to tell their employer about that, and gets auto-enrolled into a default plan that might be a PPO or something that would then disqualify the spouses from being able to contribute to that HSA.

And that's probably going to require some kind of a special rule for whatever the period is of the opt-out, because you can obviously correct that by opting out of the PPO that you were defaulted into because you already had coverage which is HSA coverage.

But I think some kind of recognition of that, but we could have continuity during that time and have the ability to continue making contributions to the HSA if that is what you in fact wanted to be enrolled in.

Amy Turner: To follow up on that, Paul would you recommend that notice? I know there have been people that mentioned before a model notice that it should include some sort of special disclosure about the extent that you may be enrolled and your spouse may be enrolled you know, in an HSA you need to know the following?

Paul Dennett: I don't know it's such a complicated set of rules that really, you know, requires something that could go back to the administrator of the HSA account to know that individual has that opportunity to opt-out.

And once opted out, they're able to count the contributions that have come in during that period when they had non-qualifying coverage but they (inaudible).

Amy Turner: Can you warn them that if they failed to act in auto-enroll, it may jeopardize their HSAs. Can you warn them of that?

Paul Dennett: Well I know I think that you probably want to. It's such a complicated [situation]. Anyway, my thought was just to put it on the radar screen as something particularly for Treasury and IRS to think about -- something that is just (inaudible) make sure that people who want HSA coverage can in fact continue to be contributing.

Jackie Abbott: Maybe it would be easier to have the HSA warn them that there is now auto-enrollment, and just make sure you don't get auto-enrolled.

Dania Palanker: The more we can think of things we want to notify people about, the longer that notice gets. And if you start putting things, you know, every potential possibility on that notice, it's going to get long and complicated. And we know people won't read it unfortunately and then it stops being effective.

And in some ways, are there other ways we can prevent that instance from happening, such as that there is sort of some -- something -- that keeps people from getting kicked out of that HSA if they opt out within a 30 day period, I'm just throwing that 30 days out there -- within a period if they opt-out if it because they were automatically enrolled so other types of ways to protect that individual?

Janet Walters: We hear you, and our colleagues do as well as other people who are actively taking notes.

Man: There is this rule that you are allowed to make your entire contribution for the year as long as you're covered in December.

So for a lot of people, that rule is going to protect them from losing whatever while they are in there before they get out of it. Protect them from losing the ability to contribute that month and it's less than likely that would prevent their employer from contributing for that month. So you look at over the course of the year.

So it may not be as a big a problem as suggested but time will tell.

Janet Walters: Do we have anybody on the phone?

Coordinator: I have no questions in queue.

Man: Okay.

Woman: I'm pleased with (inaudible).

David Flotten: Alright, I'll go first. David Flotten with Associated Financial Group. I wanted to follow up on something Jackie said starting with Treasury issues, too, that is pre-tax issues that go along with opting out.

I mean, besides the issue of can I even give a refund in the pre-tax selection, you've also got them in your election (inaudible). It says not only can we, you know, get the question about what about the money taken out, but I'm not supposed to change a pretax election now going forward without a qualifying event.

So you get kind of a double whammy of the money that's come out already, plus theory of verification from IRS that we have to keep taking it out. Which (inaudible) maybe can change the rules so that I can automatically pre-tax too if you don't auto-enroll. Which I think none of us would like.

Or we have to have some -- again -- some way out from the cafeteria rules that won't allow it to happen.

Janet Walters: Thank you.

David Johnson: I have a question.

David Johnson: Hi it's David Johnson from Riggs, Counselman, Michaels and Downs. The question I wanted to bring up -- so we've talked some about the notion of a refund. And I think we haven't really dug into the details on that, and that sort of detail is concerning to me, and one detail would be, you know, we've got some of the folks who talked about if health care is not used then that might entitle the person to a refund.

I think that's where it starts to get complicated because how does one define -- how does one -- how did the employer determine whether care has been used? Because let's say the person goes to a physician but that claim is not submitted until seven months or nine months or whatever after that visit.

Well does the employer going to have to wait a certain time period to see if a claim ever arrives before they decide well we're clear now and the fact that employee never got coverage so now we can cut the check for the refund. That's one example of how it gets complicated.

It seems simpler to say if the person does not opt-out with adequate notice that the employee would have to pay for that first month of coverage because they didn't take the action to opt out when they were given appropriate time to opt-out.

The other problem if the employer is required to keep the person on the coverage for that first month or whatever the time period is. And if the person has up until the end then say, well, I actually I didn't want coverage and now I want my refund back.

Well then most -- a lot -- of employees, I think, would be smart enough to game the system to say, "well I'm going to stretch it out as long as I can if I need care, and if I do need care then I'll pay for it. Well I've already paid for it. But if I don't need care at the end of that period I'm going to say 'look I didn't need that coverage so now I want my refund.'" And I think that could drive up cost for employers in a way that DOL probably had not anticipated.

So I just encourage you to think about two of those things that you're thinking about will you actually allow people to get refunds.

Man: I didn't hear us suggesting that you had to worry about whether they actually received services but more once they got into the eligibility period then that can be defined you know, within a reasonable period prior to, you know, the actual beginning of that month.

But certainly once you get into the month, if you decide January 3rd that you want out, too bad, you paid for January, regardless of whether they get any service. At least that's what I was hearing.

Dania Palanker: I would just add to that -- they'll probably have to be some type of some enforcement mechanism if it turned out the employer didn't actually give notice obviously most employers will. But if an employee never received notice they never received notice.

Janet Walters: So you're saying there should be procedures.

Dania Palanker: I'm not sure. Perhaps it would actually be covered somehow by ERISA -- I don't -- I really don't know if perhaps we need to... I think it's worth looking into whether there needs to be some kind of procedure on, you know, what happens? Which gets into the enforcement, what happens if someone doesn't receive notice, as well as what happens if someone isn't actually enrolled.

There are two different issues because that's the first -- we give notice, we'll have money taken out; that person who was not automatically enrolled may have actually had medical services not covered.

Janet Walters: Question?

Janet Walters: Yes.

Hannah Turner: Hi, I'm Hannah Turner. I'm with Keller Benefit Services, a benefits consulting firm. And I think I have a lot of cafeteria plan issues as well that was part of my primary concern was the refund.

In particular, let's say someone enrolled at the end of the cafeteria plan year and then their refund period, they opt-out after the end of the plan year to try to refund money after the end of the plan year, which I didn't think was generally allowed.

Or, if you're crossing tax years. So if you had money taken out in one tax year but you're giving them a refund in the following tax year. So the Treasury guys are pretty terrified when you're crossing cafeteria plan years as well as tax years. Thank you.

Janet Walters: I don't have anyone from Treasury up here but you know they are here with us, and we are coordinating. So we all hear you.

Anybody -- any other questions? We don't really have much to say in final closing remarks. As you know from hearing Dan Maguire in the beginning here, we really are in a listening mode, and we feel like today was very useful.

Thank you all for coming in and for attending in person and on the phone. The transcript of today's session will be on our Website, the EBSA Website, soon. I would give it a week or two before you start checking the EBSA Website.

And so also you have heard from us here today that we are interested in your thoughts and especially your solutions/suggestions which we've heard quite a number of today but even more well-developed or framed solutions.

But I think at this point we'll just ask you to watch for and hold off on submitting that to us. I think you'll see in the coming future - near future - a forum to do that. You heard from Mark Iwry who was here early this afternoon, they are planning and have on their schedule something coming out.

So you know, you will be hearing and seeing auto-enrollment in different contexts and wait for that to get us more defined statements or comments or solutions primarily.

Janet Walters: Thank you and we'll end the session now.

Coordinator: Thank you this concludes today's conference. You may disconnect.

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