



AMERICAN BENEFITS

COUNCIL

October 1, 2012

Submitted electronically via Notice.comments@irs.counsel.treas.gov

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

Re: Notice 2012-58 (Determining Full-Time Employees for Purposes of Shared Responsibility for Employers Regarding Health Coverage (Section 4980H))

Sir or Madam:

We write on behalf of the American Benefits Council (“Council”) to provide comment in connection with Notice 2012-58 (“Notice”), which describes safe harbor methods that employers may use to determine which employees are treated as full-time employees for purposes of the shared employer responsibility provisions of section 4980H of the Internal Revenue Code of 1986, as amended (“Code”), as added by the Patient Protection and Affordable Care Act (“ACA”).

The Council is a public policy organization representing principally Fortune 500 companies and other organizations that assist employers of all sizes in providing benefits to employees. Collectively, the Council’s members either sponsor directly or provide services to health and retirement plans that cover more than 100 million Americans.

BACKGROUND

Effective January 1, 2014, Code section 4980H will assess a payment on an “applicable large employer” that fails to satisfy certain requirements in connection with its provision of minimum essential coverage to its full-time employees (and their dependents). An employer is an “applicable large employer” if it employed at least 50 full-time employees, including full-time equivalent employees, on business days during the preceding calendar year. It is important for employers to be able to clearly and easily determine whether they are “applicable large employers” subject to Code section 4980H, and, in addition, to clearly and easily determine whether each employee is a full-time employee that must be offered minimum essential coverage that is affordable and provides minimum value as described in Code section 36B. Code section 4980H provides that a full-time employee with respect to any month is an employee who is employed on average at least 30 hours of service per week.

Previous guidance issued by the Department of the Treasury and the Internal Revenue Service (collectively, the “Service”) has provided helpful information regarding the determination of full-time employee status. We appreciate the additional guidance provided by the Service in Notice 2012-58.

GENERAL COMMENTS

Reliance. The Notice makes clear that employers may rely on the guidance provided, and specifically states that employers will not be required to comply with any more restrictive subsequent guidance on the issues specified in the Notice until at least January 1, 2015. We strongly support this clarification as it permits employers to undertake preparations in anticipation of Code section 4980H becoming effective even though formal rulemaking has not yet been issued.

Good Faith Compliance. Given that employers must establish their measurement periods in a short turnaround time (i.e., by January 1, 2013 for employers that expect to use a 12-month measurement period for a stability period beginning January 1, 2014, or even earlier if the employer intends to utilize an administrative period), it would be helpful for the Service to adopt an enforcement stance that is similar to that adopted with respect to the Summary of Benefits and Coverage requirements.¹ Specifically, we urge the Service to provide that, during the first year of applicability, it will not impose penalties on employers that are working diligently and in good faith to determine whether they are applicable large employers and, if so, which employees are full-time employees for purposes of Code section 4980H.

¹ See FAQs About Affordable Care Act Implementation Part VIII (Mar. 19, 2012), available at <http://www.dol.gov/ebsa/pdf/faq-aca8.pdf>

Transition Relief. As mentioned above, employers that wish to utilize a 12-month measurement period for purposes of the stability period beginning January 1, 2014, must commence the measurement period no later than January 1, 2013. Moreover, for those employers that also seek to utilize a full 90-day administrative period prior to the start of their stability period (as permitted in the Notice), these employers would need to commence their measurement periods as early as October 3rd, which is but days away. Given these very rapidly approaching dates, it may not be practicable or possible for employers to adopt a full 12-month period during the 2013 lead-up to January 1, 2014. We therefore urge that the Service issue transition relief that would allow employers to adopt a measurement period that may be shorter than 12 months in 2013 while still allowing employers to utilize a full 12-month stability period beginning January 1, 2014.

De Minimis Rule. The statutory language of Code section 4980H suggests that an employer could face significant monetary penalty if it fails to make available qualifying coverage to even just one full-time employee in accordance with the Code section and Notice 2012-58. If so, notwithstanding an employer's reasonable, good faith efforts in complying the employer shared responsibility requirements, an employer could confront a disproportionately large assessable payment in the event it fails to make available qualifying coverage to one or a very small percentage of full-time employees. This could have substantial and negative effects on employers, including not only with respect to the payment of a significantly large penalty, but also by implicating financial disclosure requirements given the potential magnitude of the penalty.

Accordingly, we urge the Service to implement a de minimis rule whereby an employer does not trigger liability under Code section 4980H to the extent a de minimis amount of full-time employees (*e.g.*, the lesser of 5% of controlled group full-time employees or 30 full-time employees (the latter of which equals the number of employees excluded for purposes of calculating any assessable payment)) are not provided the requisite coverage for any given calendar month, notwithstanding the employer's reasonable and good faith efforts.

Definition of "Hours of Service." Prior Notice 2011-36 included a definition of "hours of service" for purposes of determining whether an employer is an "applicable large employer" and, thus, subject to Code section 4980H. Although Notice 2012-58 does not expressly incorporate this definition for purposes of measuring whether an employee works a full-time schedule and thus should be eligible for coverage, it is our understanding that the Service intends to make this definition also applicable for such purpose.

The definition of "hours of service" set forth in Notice 2011-36 includes not only

hours of work for which an employee actually works and is paid, but generally also includes paid-time off. We reiterate our request that the Service define “hours of service” to include only hours which an employee actually works and to not include hours for which no work is performed, *e.g.*, vacation, layoff, leave of absence, jury duty, military duty. A contrary rule is cumbersome and hard to administer.² Additionally, it may have the effect of overstating employment status and rendering certain employees as full-time (notwithstanding that they performed services giving rise to part-time employment based on hours worked). We also urge the Service to confirm in future rulemaking the guidance provided in Notice 2011-36 that employers can use additional methods of measuring full-time employee status, *e.g.*, allow employers to use an average of hours over more than one week such as an average of 130 hours per month versus an average of 30 hours per week.

Definition of “Employee.” As part of any formal rulemaking, we urge the Service to confirm, as provided in Notice 2011-36, that employers need only count common-law employees as full-time employees; temporary or leased employees that are not common-law employees of the employer would not be counted for this purpose.

Treatment of Rehired Employees. With respect to rehired employees, we urge the Service to allow employers to apply a new initial measurement period to rehired employees, so long as their termination of employment was bona fide termination and for reasons other than avoidance of the requirements Code section 4980H. To require an employer to maintain records with respect to measurement periods for routine terminations would be administratively cumbersome. Alternatively, we recommend a rule whereby a new measurement period would not apply to employees terminated and rehired within a single measurement period; rather, the original measurement period would continue to apply even during the period of termination, but the period of time from and between the date of termination of employment and rehire would be credited with zero hours for purposes of determining whether the rehired employee worked a full-time schedule during the measurement period.

Change in Status. With respect to employees that move from full-time to part-time status during a stability period, we urge the Service to clarify whether those employees must continue to be treated as full-time employees for the remainder of the stability period. Additionally, with respect to employees that move from part-time status to full-time status during a stability period, we request confirmation that such employees are not required to be treated as full-time employees for purposes of Code section 4980H for the remaining duration of such stability period.

² See Council letter dated June 15, 2011, available at http://www.americanbenefitscouncil.org/documents/hcr_shared-irs-comments061511.pdf

On a related note, guidance is needed regarding how employers should treat a variable hour employee who is determined to be a full-time employee for purposes of a stability period, terminates employment during such stability period, and is rehired during such stability period in a part-time capacity and is not reasonably expected to work full-time hours. Specifically, we urge the Service to issue guidance confirming whether the employer must treat the employee as if he did not experience a termination and continue to treat him as a full-time employee for the remainder of the stability period, or whether the employer may reclassify the employee as a part-time employee for the remainder of the stability period.

Determination of Hours Worked for Non-Monthly Payroll Periods. Many employers maintain employees' hours of service records on a payroll period basis, which do not necessarily correlate with months, quarters, and years. We urge the Service to issue guidance providing certain equivalency guidelines that could be used in enabling employers to determine hours worked on something other than a monthly payroll period basis.

Safe Harbor Methods for Short-Term Employees and Others. Notice 2012-58 specifically requests comments on a host of issues. Question 1 asks whether and, if so, what types of safe harbor methods should be available to employers for use in determining the full-time status of short-term assignment employees, temporary staffing employees, employees hired into high-turnover positions, and other categories of employees that may present special issues.

We appreciate that the Notice provides a new safe harbor specifically for use in determining whether newly hired variable hour or seasonal employees are considered full-time employees for purposes of Code section 4980H. Specifically, the Notice permits employers to use a reasonable, good faith interpretation to apply the same initial measurement period to these employees that it applies to "regular" variable hour employees, which can be between 3 and 12 months in duration. To the extent a seasonal employee is no longer employed at the close of the initial measurement period, the employer is not required to make available qualifying coverage to the seasonal employee. Employers are permitted to use a reasonable, good faith interpretation in determining who is a seasonal employee.

Seasonal employees and other short-term employees pose interesting issues for employers with respect to complying with Code section 4989H. This is because they may be expected to work a full-time schedule for the duration of their employment, but they are only expected to work for a relatively short period of time.

We believe the rule set forth in the Notice is good public policy and urge the Service to make this rule permanent. If an employee is only going to be employed for a short

period of time, all parties are best served by ensuring that the employee has continuous coverage and does not experience laps in coverage. Allowing short-term employees to join an employer's plan for but a few months (especially in light of the application of the 90-day waiting period) could be disruptive to their coverage. Additionally, it would be administratively complex and burdensome to administer for employers, the short-term employee, and the state exchanges alike. Accordingly, we urge the Service to make permanent the rule for seasonal employees set forth in Notice 2012-58 and to clarify that "seasonal" employment encompasses not only employment at a specific time of year, but more generally, employment that is expected to last less than 12 months.

On a related note, we appreciate that the Notice expressly permits employers to use measurement periods and stability periods that differ either in length or in their starting and ending dates for certain categories of employees, including (i) collectively bargained employees and non-collectively bargained employees, (ii) employees of different entities, and (iii) employees "located in different states." Given that employees may live in one state and work in a neighboring state, clarification is requested regarding whether employers should look to an employee's place of residence or work in determining in which state they are "located." Additionally, we urge the Service to issue additional guidance allowing employers to use different measurement periods and stability periods for various categories of collectively bargained employees, as well as for employees that are employed in different business segments, *e.g.*, divisions, plants. Guidance regarding the treatment of employees who shift between categories during a single measurement period would also be helpful.

Safe Harbors Regarding Determining Full-Time Hours. Question 2 of the Notice asks whether the IRS should develop additional guidance (such as relevant factors or safe harbors) to assist employers and employees in determining, as of an employee's start date, whether the employee is reasonably expected to work an average of at least 30 hours per week, including whether the employee is a variable hour employee, and, if so, the types of factors or safe harbors that should apply for this purpose.

We urge the Service to allow employers to base the determination of whether a newly hired employee is reasonably expected to work an average of at least 30 hours per week, including whether the employee is a variable hour employee, on whether similarly situated employees have traditionally worked an average of at least 30 hours per week. If they have, then the employee will be subject to the rules for new employees that are reasonably expected to work full-time, *i.e.*, be offered coverage at or before the conclusion of the employee's initial three calendar months of employment without subjecting the employer to an assessable payment under Code section 4980H by reason of its failure to offer coverage to the employee for such period. Conversely, if similarly situated employees have not traditionally worked an average of at least 30 hours per week, then the employee will be subject to the safe harbor for variable hour employees and seasonal employees as described in the Notice.

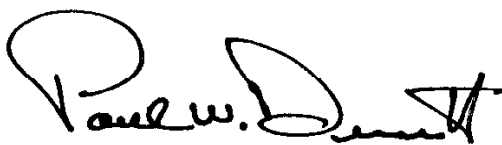
Seasonal Employee Definition. Question 4 of the Notice asks how the term “seasonal worker” should be defined under Code section 4980H, including: (a) the practicability of using different definitions for different purposes (such as status as an applicable large employer or, with respect to an applicable large employer, status of a new employee as full-time); and (b) whether other, existing legal definitions should be considered in defining a seasonal worker under Code section 4980H (such as the safe harbor for seasonal employees in the final sentence of Treas. Reg. section 1.105-11(c)(2)(iii)(C)). As we stated with respect to Question 1, we urge the Service to make permanent the rule for seasonal employees set forth in Notice 2012-58 and to clarify that “seasonal” employment encompasses not only employment at a specific time of year, but more generally, employment that is expected to last less than 12 months.

Application to Taft-Hartley Plans. In the case of a Taft-Hartley plan, it is possible that a single employee may work small, variable hours for several employers that participate in the plan. This issue is not addressed in the Notice, and guidance is needed regarding how to determine the status of such an employee for purposes of Code section 4980H.

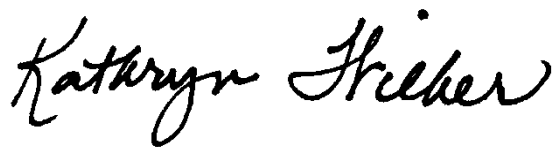
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We appreciate the opportunity to provide comments regarding the determination of full-time employees for purposes of shared responsibility for employers regarding health coverage. If you have any questions or would like to discuss these comments further, please contact us at (202) 289-6700.

Sincerely,



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