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April 9, 2012

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

Submitted electronically: e-ohpsca-er.ebsa@dol.gov

Re: DOL Technical Release No. 2012-01

The International Association of Amusement Parks and Attractions (IAAPA) is the largest trade association for permanently situated amusement facilities and attractions. IAAPA represents more than 4,000 facility, supplier, and individual members in the U.S. Member facilities include amusement and theme parks, waterparks, attractions, family-entertainment centers, arcades, zoos, aquariums, museums, science centers, resorts, and casinos. Our membership ranges from very large, multi-location facilities to small, single-site, family-owned operations.

IAAPA appreciates the opportunity to comment on the Departments of Labor, Health and Human Services, and the Treasury's *Frequently-Asked-Questions from Employers Regarding Automatic Enrollment, Employer Shared Responsibility, and Waiting Periods* document ("FAQ document"):

Seasonal Employees
Our members rely heavily on seasonal employees, as many of their facilities only operate during part of the year. Each full-time, permanent position within an amusement park or attraction is augmented by approximately ten temporary seasonal positions during peak summer months. These temporary seasonal employees are often young people in their first jobs, retirees, school teachers, or others who enjoy supplementing their income during the summer months.

While integral to our members' operations, for the most part, our industry's seasonal workers are hired for a short, temporary period of time with a very different set of expectations and responsibilities than their full-time permanent employees. While some may change their status to become full-time permanent employees, for the vast majority, the expectation of both the employee and employer is that the employment situation is temporary and will end when the season ends. We are proud of the employment opportunities that the attractions industry provides but it is important for the Administration to recognize that a seasonal workforce is accompanied by unique administrative challenges which cannot be ignored in the implementation of the Patient Protection and Affordable Care Act (PPACA).

The definition of "full-time" employee under PPACA is of particular interest to IAAPA, given the number of seasonal workers that the industry employs every year and the variable nature of their hours and schedules.

Reducing Administrative Burden
IAAPA appreciates the proposal's sensitivity to the administrative burden on employers, especially smaller employers that may not be small enough to be exempt from the requirements of PPACA, but still have senior management wearing multiple hats.

In seasonal businesses like those found in the attractions industry, employee tenures are not long, which in itself creates quite a workload for human resources staff. Streamlining the administrative burden is important to the attractions industry. IAAPA offers the following suggestions for streamlining administrative burden:

- **Quarterly review.** As we will discuss, IAAPA supports the direction the agencies are heading with the look-back/stability concept. To the extent that the look-back period can be a fixed quarterly (or even annual) exercise, as opposed to going through the process on a monthly basis, administrative burden on employers, especially smaller employers, would be greatly reduced.
- **Specific Exclusion for Minors under 18.** Nearly all children aged 18 and under have health coverage through some source already – a safe harbor should be created for not having to offer them coverage, and subsequently not having to review these employees for the look-back stability purposes.

In addition to these general comments, IAAPA has responses to specific questions and answers provided in the FAQ document:

Proposal for determining if an employee (other than a newly-hired employee) is a full-time employee (A4)
As we said in our comment to the IRS on the *Request for Comments on Shared Responsibility for Employers Regarding Health Coverage* (attached), IAAPA supports the concept of look-back/stability proposal for determining an employee's full time status for purposes of the employer responsibility provisions (Section 4980H). In order to get an accurate assessment of an employee's relationship with the company, a look-back period of up to 12 months should be allowed for employees who are not hired as full-time.

Proposal for determining if a newly-hired employee is a full-time employee (A5)
As previously mentioned, IAAPA supports the concept of look-back/stability proposal for determining an employee's full time status for purposes of the employer responsibility provisions (Section 4980H). A look back/stability period will provide businesses with the predictability they need to make employment decisions and continue to employ a large and fluctuating number of seasonal employees. However, as stated in our comments to the IRS, a look-back/stability period for new hires should extend beyond six months. It would not be unusual for a seasonal employee at an attractions facility to appear to be "full time" during a six-month look-back period, especially for employees at businesses with active "shoulder seasons" (specifically, Halloween or holiday season festivities), but on an annual basis fall well short of the 1,560 annual hours required to be a full time employee (30 hours/week x 52 weeks). The reasonable expectation and look-back period should extend up to 12 months for all employees.

Affordability Safe Harbor (A2)
IAAPA supports the proposal to allow employers to use wages from the previous year's W-2 ***as one option*** for meeting the affordability safe harbor. However, as the attractions industry faces high turnover of its seasonal employees from year to year, we do not want this to be the only option available to satisfy the safe harbor requirements. The ability to look at an employee's current wages would also be helpful, especially in the case of new hires, or promoted employees. Some of our facilities, for logistical or other reasons, others would prefer to use the general rule which states an employee's premium contribution for self-only coverage cannot exceed 9.5% of the employee's household income. IAAPA requests the agencies grant employers the flexibility to determine which method is appropriate for their businesses.

IAAPA applauds the Departments of Labor, Health and Human Services, and the Treasury for seeking input from stakeholders and promulgating the forthcoming rules in a transparent fashion, and thanks them for the opportunity to offer comments on the FAQ document.

If you need additional information, or if I can answer any questions, please do not hesitate to contact me.

Respectfully,

Randall Davis
Senior Vice President, Safety & Advocacy

Attachment (1): IAAPA Response to IRS Notice 2011-36

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June 17, 2011

Courier's Desk
Internal Revenue Service
Attn: CC:PA:LPD:PR (Notice 2011-36)
1111 Constitution Avenue, N.W.
Washington, DC 20224

Or

Via: comments@irscounsel.treas.gov

Re: Request for Comments on Shared Responsibility for Employers Regarding Health Coverage (IRC Section 4980H, as created by PPACA Section 1513)

The International Association of Amusement Parks and Attractions (IAAPA) is the largest trade association for permanently situated amusement facilities and attractions. IAAPA represents nearly 3,000 facility, supplier, and individual members in the United States. Member facilities include amusement/theme parks, waterparks, attractions, family-entertainment centers, arcades, zoos, aquariums, museums, science centers, resorts, and casinos. IAAPA members consist of very large, multi-location facilities as well as small, single-site, family-owned operations. Each full-time permanent position within the amusement park and attractions industry is augmented by approximately ten temporary seasonal positions during our peak summer months. These temporary seasonal employees are often young people in their first jobs, retirees, school teachers, or others who supplement their income during the summer months.

While integral to our operations, for the most part, our industry's seasonal workers are hired for a short, temporary period of time with a very different set of expectations and responsibilities than our full-time permanent employees. While some may change their status to become full-time permanent employees, for the vast majority, the expectation of both the employee and employer is that the employment situation is temporary and will end when the season ends. The seasonal workforce opportunities that our industry provides serve an important need in the communities in which we are located. However, if the attractions industry is to continue to provide needed job opportunities, it is essential that the Administration recognize that a seasonal workforce is accompanied by unique administrative challenges which cannot be ignored in the implementation of PPACA.

IAAPA appreciates the opportunity to submit comments on the Shared Responsibility for Employers Regarding Health Coverage early in the regulatory process. The definition of "full-time" employee is of particular interest to IAAPA given the number of seasonal workers that the industry employs every year and the variable nature of their hours and schedules. In the attractions industry, seasonal employees are employed based on the assumption that their jobs are temporary rather than full-time permanent positions.

IAAPA strongly supports an employer look-back/stability period in determining which employees are full time and appreciates the Administration's acknowledgment that trying to determine an employee's status on a monthly basis may cause "practical difficulties for employers, employees, and the State Exchanges" and will undoubtedly create churn between the State Exchanges and employers. A look-back/stability period based on a period not less than 12 months or the employer's plan year will provide businesses with the predictability they need to make employment decisions and continue to employ a large and fluctuating number of seasonal employees. IAAPA also supports a determination that employers are exempt from the requirements of Section 4980H for seasonal employees.

Set out below are IAAPA's comments with regard to the Shared Responsibility for Employers Regarding Health Coverage:

General Exclusion of Seasonal Employees. IAAPA urges adoption of a general exception for seasonal employees. Although seasonal employees (working 120 days or fewer during the calendar year) are excluded from determining whether an employer is subject to Internal Revenue Code section 4980H at the outset, the statute does not exclude them from the definition of full-time employee for purposes of determining whether the employer is subject to 4980H(a)or (b) (i.e., is an offering or non-offering employer), nor the amount of the assessable penalty under either of those subsections.

IRS clearly recognizes the practical issues with determining whether such individuals must be considered full-time employees, and also appears to acknowledge that policy considerations for covering those employees differs from policy considerations that apply to other employee populations. Rather than imposing burdensome recordkeeping requirements on employers, a more workable rule would allow employers to completely exclude from the definition of "full-time employee" a seasonal employee working 120 days or fewer during the calendar year.

Specific Exclusion for Classes of Seasonal Workers. In addition, or if the agencies fail to adopt the above proposals, we urge adoption of exceptions to the definition of "full-time employee" that are consistent with the Patient Protection and Affordable Care Act's goal of making coverage available without creating additional costs and administrative challenges associated with offering coverage to specific types of employees who don't need or expect it:

- Medicare and TRICARE beneficiaries.
- Non-resident aliens.
- Minors and young adults.

Nearly all employees aged 18 and under have health coverage through some source already – a safe harbor should be created so that employers are not required to offer them seasonal coverage. The PPACA requires group health plans to allow a primary insured's natural, adopted, step- and foster-children to remain on the parent's health plan until age 26; so seasonal employers should not have to offer those aged 19 to 26 coverage (or alternatively, only to those who indicate they don't have access to other coverage).

The practical impact, absent such exceptions, would be an offer of coverage that would typically be refused or, if accepted, would normally last for one or two months before expiration (in the event that seasonal employees are required to be covered). To the extent that such a worker accepts coverage for such a short time, there would additional costs to the health care system – extra COBRA, Medicare, and TRICARE administration; higher transactional expense for the Exchanges; costs to the provider community (in short-term changes from one clinician to another due to plan networks) – and potentially to the optimal health care outcomes of the individual. For seasonal employers, the costs of administering such an offering (or, alternatively, paying the Shared Responsibility penalty) would be high, relative to these workers' wages; seasonal employers may need to manage these costs by hiring fewer workers.

Methods for determining how full-time employees should be defined. IAAPA strongly supports a look-back/stability period for determining each employee's full-time status. This should be utilized for all new seasonal, temporary, and part-time workers. Limiting the application of a look-back period would be extremely problematic for employers with large numbers of such workers.

Employers should have the flexibility to base a look-back period on their plan year or a period no less than 12 months in length. A look-back/stability period for temporary employees, as suggested by the Administration, would provide the degree of certainty and stability businesses need in planning. While hiring decisions are dependent on the specific type of business, seasonal employees in the attractions industry generally begin around Memorial Day and terminate employment around Labor Day. In some facilities and locations hiring occurs around Easter/Spring Break and some limited seasonal work continues through Halloween or Christmas. Workers hired early in the season are not necessarily the same ones that can work through October.

A typical theme park's employment schedule looks like a bell curve with July and August representing the peak months. A typical amusement park hires thousands of seasonal workers annually who work, on average, 400-500 hours over the course of three to four months. However, the hours are not consistent; an employee, who is hired May 15th, may work 20 hours per week in May, 40 hours per week in July and August and less than 20 hours a week again in September. But work schedules vary tremendously and often based on weather, changing school calendars and other factors that do not remain consistent and vary by locality. An appropriate look-back/stability period would enable businesses to accurately evaluate which employees are averaging 30 or more hours per week versus those

who work 30 hours per week for a short period of time to accommodate peak business needs at each individual business site.

Businesses need the flexibility of a look-back/stability period to determine who is full-time. Once this determination is made, employers, who have complex and established employment and benefit enrollment systems need the flexibility to be able to integrate the new requirements into their existing systems.

90-Day Waiting Period. IAAPA believes that for employers offering health care plans, it is imperative that the 90-day waiting period should begin only once it is determined that the employee is eligible for the employer's plan based on the look-back period. This would minimize the churn within the system and provide the stability and predictability that companies need to run their businesses effectively, particularly businesses that have a large number of temporary and seasonal employees and experience a high percentage of turn-over. Employees should be required to maintain their status during the 90-day waiting period in order to remain eligible. For employees that are hired or promoted to a position which is anticipated to be full-time, the waiting period should begin on the date employment commences.

Penalties. Penalties should not be applied during the look-back period or during the waiting period. The very purpose of a look-back period is to determine which employees have sufficient connection to the business to be considered full-time employees. Imposing penalties during a look-back or waiting period would be premature of the determination of which employees are in fact full time. Section 4980 (H)(c)(2) excludes seasonal workers for purposes of determining the fifty-employee threshold required to be subject to the law's employer shared responsibility provisions. The law is silent as to how seasonal employees should be treated for purposes of calculating tax penalties. Given the short-term temporary nature of their employment, IAAPA urges the Commission to clarify that seasonal employees should not be treated as full-time for purposes of calculating tax penalties.

Employers should not be required to pay penalties on employees for whom they provide coverage. IAAPA's members generally provide health care coverage to their full time permanent employees once the employee has completed his or her waiting/probationary period. Penalties should be limited to the full-time employees for whom the employer does not provide coverage. To do otherwise would discourage coverage of full-time permanent employees, thus sabotaging the intent of the law which is to expand overall coverage.

Reponses to Special Situations Proposed in RFC.

Situations A & B: IAAPA members would like to retain the ability to offer benefits to full-time positions that are designed to be long term at time of hire/promotion, subject to the maximum 90-day waiting period, specified by the Patient Protection and Affordable Care Act.

Situation E: IAAPA agrees that employees hired as seasonal workers or for certain temporary or variable-hour categories of employment should be ineligible to enroll in the

group's health plan, even if such an employee works a sufficient number of hours to satisfy the plan's eligibility requirement for non-seasonal employees. However, as stated above, if this employee changes status businesses should have the flexibility to be able to (but not be required to) offer this employee insurance coverage without a waiting period.

Situation F: Under the PPACA, employers are not required to provide health insurance for part time employees who work fewer than 30 hours per week. The regulations implementing the PPACA should not contradict the law, however employers should be granted the flexibility to establish criteria for provide benefits for part time employees if they so choose.

In conclusion, IAAPA thanks you for the opportunity to comment on the look-back/stability approach to implementing Section 4980(H). We appreciate the Administration's acknowledgment of the difficulties for the state exchanges as well as employers of implementation of this section if a look-back/stability method is not taken. We also appreciate the Administration's acknowledgement that seasonal workers are very different in nature than full-time permanent employees, and as such, implementation of Section 4980(H) needs to address this difference.

I would be pleased to answer any questions you may have.

Sincerely,

Randy Davis
Senior Vice President
Government Relations