NATIONAL EDUCATION ASSOCIATION
nea.org
Great Public Schools for Every Student

1201 16th St., N.W. | Washington, DC 20036 | Phone: (202) 833-4000

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 Ave., NW
Washington, D.C. 20210

Sent via email: e-ohpsca-er.ebsa@dol.gov

Ladies and Gentlemen:

On behalf of more than three million members, the National Education Association is pleased to provide these comments on Technical Release 2012-01, related to automatic enrollment, employer shared responsibility, and waiting periods. As strong supporters of the Patient Protection and Affordable Act, we once again write with the goal of urging the Department of Labor, Department of Health and Human Services, and the Department of the Treasury (the departments) to ensure that regulations are as protective of current and prospective health plan members as possible.

Automatic Enrollment and 90-Day Limitation on Waiting Periods

The Affordable Care Act aimed, among other laudable objectives, to expand the number of people in this country with high-quality health benefits. The law's automatic enrollment provision, found in Section 1511, was one important way that the ACA sought to meet that much-needed goal. For that reason, we are disappointed that Technical Release 2012-01 asserts, "The Department of Labor has concluded that its automatic enrollment guidance will not be ready to take effect by 2014" (p. 4). We urge the departments to take whatever steps are necessary to ensure that guidance required for the implementation of ACA Section 1511 is issued in time for the law's automatic enrollment provision to become effective by January 1, 2014.

Another important way that the Affordable Care Act intended to expand health insurance coverage was by limiting the amount of time that employers could wait before offering coverage to newly hired employees. The law, in general, indicates that waiting periods shall not be longer than 90 days. We understand that in some contexts, waiting periods based on criteria other than the simple passage of time could be appropriate. Such could be the case, for example, for a plan in which a certain number of hours must be worked before an employee is eligible. Technical Release 2012-01 indicates that the departments intend to issue regulations to the effect that the 90-day waiting period would begin after any other legitimate waiting periods ended. With the ACA's goal of expanding coverage in mind, we reiterate our belief, which we expressed in our

June 17 letter, that the law's 90-day waiting period should be applied after a longer eligibility period has already elapsed. That is, the 90-day period should run concurrently with other permissible waiting periods, not consecutively.

Employer Shared Responsibility

The Technical Release's Approach to Full-Time Work Does Not Accurately Reflect the Way Public Education Employees Work and Will Undermine the ACA

On June 17, 2011, the National Education Association submitted to the Internal Revenue Service a 13-page comment letter on the employer shared responsibility provision of the Affordable Care Act of Internal Revenue Code Sec. 4980H. Our letter was long because we felt it vitally important to explain how education employees' work schedules did not conform to the notions of work underlying the proposed regulatory approach to the shared responsibility provisions. In part, our concern was that full-time education employees who do not formally work in the classroom during summer months would not consistently be considered full-time for purposes of Section 4980H, because the proposed regulatory definition of hours of service would require full-time service every month. We reiterate our belief that both logic and the intention of the Affordable Care Act should lead the departments to conclude that education employees should be considered full-time for purposes of Section 4980H when their work year or regularly scheduled hours define them as full time employees.

Unfortunately, the proposed definition about which we wrote in our June 17 letter has resurfaced in Technical Release 2012-01 in a way that would undermine Section 4980H and diminish health care coverage for new employees. Indeed, the technical release indicates that the departments intend to provide, "If a newly-hired employee is reasonably expected to work full-time on ***an annual basis*** and does work full-time during the first three months of employment, the employee must be offered overage under the employer's group health plan as of the end of that period in order to avoid the possibility that the employer would be subject to a section 4980H payment after the end of that three-month period" (p. 5, emphasis added). The problem is that, for an education employee not expected to be providing formal service during summer months, an employer could determine that the employee was not working full time in every month of the year and could, therefore, not offer coverage to this employee without fear of a penalty.

As proposed in Technical Release 2012-01, the determination of whether a newly hired employee is full-time could guarantee that employers in the public education sector are not exposed to the possibility of penalties for new hires for at least three-quarters of a year. For example, a newly hired full-time teacher would, under proposed guidelines, not be expected to work "full-time on an annual basis" if summertime is factored in to the analysis (as the departments seem intent on doing and which NEA believes is inappropriate). As a result, an employee who begins work in September could lead to no penalty for the employer until March. The employer would also potentially be free from penalties during the summer months, when, according to the proposed approach to hours of service, the teacher would not be considered full time.

Once again, we urge that the departments factor into their regulations definitions of full-time work that accurately reflect the way public education employees' work is structured. Failure to do so could undermine the Affordable Care Act's important shared employer responsibility provisions and extend the amount of time individuals are uncovered by employer-sponsored insurance.

Thank you for your time and consideration.

Sincerely,

Carolyn York

Carolyn York
Manager, Collective Bargaining and Compensation