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Office of Health Plan Standards and Compliance Assistance  
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Room N-5653  
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Re: DOL Technical Release No. 2012-01

Herschend Family Entertainment Corporation, on behalf of itself and its affiliates ("HFEC") files these Comments in response to the Department of Labor's ("DOL") Request for Comments on Frequently Asked Questions from Employers Regarding Automatic Enrollment, Employer Shared Responsibility, and Waiting Periods, Technical Release 2012-01 ("Release").

Many of the issues set forth in the DOL's Release are substantially similar to the issues raised by the Internal Revenue Service ("IRS") in its Request for Comments on Shared Responsibility for Employers Regarding Health Coverage, Notice 2011-36 ("Notice"). HFEC attaches the Comments it filed in that proceeding as Exhibit A to this letter ("Comments"). HFEC strongly supports the positions set forth in its Comments to the Notice as they impact important issues affecting employers of large numbers of seasonal workers.

As it stated in its Comments to the Notice, a large portion of our economy is supported by such employers in various industries such as theme parks, ski resorts, retail, restaurants, agriculture, fishing and tourism. Indeed, During its peak seasons, HFEC has more than 8,000 full-time, seasonal, and part-time employees. These seasonal and part time employers have unique employment circumstances in the application of many of the Patient Protection and Affordable Care Act ("Healthcare Act") provisions. The agencies implementing rules and regulations regarding these provisions of the Healthcare Act must provide rules and regulations with an ease of understanding and use, flexibility in application, and certainty in business operations. Anything else

will only increase regulatory burdens on an already overburdened group of employers and will be disruptive to the business. For this reason, HFEC welcomes the IRS's and DOL's inquiries and request for comments and looks forward to final rules and regulations that will provide clarity around these issues and eliminate potential disruption in the marketplace.

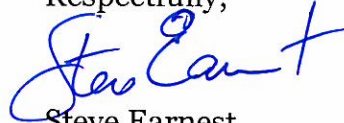
In response to Answers to Questions 4 and 5, HFEC contends that employers should be allowed to select the time frame, not to exceed one-year, for the look back period for determining whether an employee (both newly hired and non-newly hired) is a full-time employee. Because industries operating cycles differ, a defined timeframe of three or six months may be too short (*see*, Section II of the attached Comments).

Additionally, in response to Answers to Questions 6 and 7, a matter of great importance to our industry is the determination of whether the ninety day waiting period begins again for seasonal employees who are determined to be fulltime employees at the beginning of each new season after a break in service. Although not addressed in the DOL answers, HFEC contends that the period should begin anew for these employees. That is, each such employee should be treated as a new employee for the ninety day waiting period (*see*, Section IV of the attached Comments).

In summary, as HFEC pointed out in its Comments, the rule making agencies should implement a look back period for determining whether an employee is a full-time employee, and not limit the look back period to less than twelve (12) months. Additionally, the ninety (90) day wait provision should start over any time an employee determined to be a full-time employee has a break in service.

HFEC appreciates the opportunity to provide the DOL comments on these matters. If you need additional information, or if I can answer any questions, please do not hesitate to contact me.

Respectfully,



Steve Earnest

Vice President & General Counsel

SLE/sj

Attachment

Before the  
INTERNAL REVENUE SERVICE  
Washington, D.C. 20

Requests for Comments on Shared  
Responsibility for Employers Regarding  
Health Coverage (Section 4980H)

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Notice 2011-36

**HFEC COMMENTS**

**HERSCHEM FAMILY  
ENTERTAINMENT CORPORATION**

By its Attorney

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Dated: June 17, 2011

**TABLE OF CONTENTS**

**I. Introduction and Summary.....3**

**II. The IRS Should Adopt an Alternative to A Month-by-Month Basis for Determining Full-Time Employees Under § 4980(H).....5**

**A. Determination of Full Time Employment on a Month-By-Month Basis is Impracticable and Overly Burdensome on Employers.....5**

**B. A Month-By-Month Determination Causes Uncertainty for Employees and State Exchanges.....6**

**C. The IRS Must Implement a LB/SP Safe Harbor.....7**

**D. Employees Who Work for Only Part of the Look Back Period.....8**

**III. Interpretation of Section 4980(H).....9**

**A. Section 4980(H) Must Be Applied Consistent with the Statute.....10**

**B. Section 4980(H) Should Exempt Classes of Employees.....11**

**IV. Ninety Day Waiting Period Should Begin Again After Each Break In Service.....12**

**IV. Conclusion.....12**

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Notice 2011-36\_

**HFEC COMMENTS**

Herschend Family Entertainment Corporation, on behalf of itself and its affiliates ("HFEC"), by its attorneys, files these Comments in response to the Internal Revenue Service ("IRS") Request for Comments on Shared Responsibility for Employers Regarding Health Coverage, Notice 2011-36 ("*Notice*").

HFEC is the largest privately held theme park operator in the United States. Its humble beginnings date back to 1950 when Hugo and Mary Herschend acquired a lease on Marvel Cave near Branson, Missouri. A decade later, as the popularity of the cave grew, so did the lines. In order to entertain cave guests during their wait, the widowed Mary, along with a staff of 17, opened a small 1880's-themed village on the cave's grounds. Silver Dollar City became a huge success - forming the foundation of Herschend Family Entertainment. Today, HFEC owns, operates or manages 24 themed entertainment properties across ten states including Silver Dollar City in Branson, Missouri and Dollywood<sup>1</sup> in Pigeon Forge, Tennessee. During its peak seasons, it has more than 8,000 full-time, seasonal, and part-time employees.

The uninformed would likely paint HFEC with a broad brush as an employer with a very young transient work force that flock to its parks during the summer months. The reality is,

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<sup>1</sup> Dollywood is jointly owned by HFEC and Dolly Parton Productions, Inc. HFEC is the managing partner of Dollywood.

however, that HFEC's seasonal employees are widely diverse in age groups. In fact, for 2011 only 39% of HFEC's employees are below the age of 30. The remaining employees range from age 31 to 86. And, the vast majority of these employees have continued to work at HFEC season after season.

The reasons for HFEC's continued long-term seasonal employees are many. For example, many seasonal workers enjoy and want the ability to work seasonally while enjoying other pursuits the remaining parts of the year. Some employees are retired from other professions and want a different experience for a "second career." Other employees take pleasure in living in different locations for different parts of the year.

Whatever the reason, these workers have chosen seasonal employment as a lifestyle. They make this choice with an outlook that differs from a non-seasonal employee. The reasons are obvious, seasonal workers are not full time employees and typically do not fit into health care plans offered by employers. Even with this realization, they continue to make the decision to be seasonal workers year after year.

This is not to imply that some seasonal employees do not need health care. Indeed, HFEC realizes this need and has established programs to help in this need. For years HFEC has paid for a health clinic in Branson, Missouri and Pigeon Forge, Tennessee. These clinics are dedicated exclusively for HFEC employees and their immediate families. Employees may receive medical attention at these clinics for only a small co-payment (currently \$15-\$20). All other costs of the facilities -- doctors and nurses salaries, supplies, and infrastructure -- are paid by HFEC. Additionally, HFEC employs nurses at two of its smaller properties -- Stone Mountain Park and Wild Adventures -- to assist employees with health and wellness issues.

The accommodations that HFEC provides its seasonal workers, however, is a two way



street. The demand for good and talented seasonal employment is tight in many of HFEC's markets. If HFEC fails to provide services that will attract this employment, other employers will. At bottom, most of HFEC's seasonal work force wants to be seasonal by choice. HFEC needs good seasonal employees and wants to attract those employees year after year. HFEC will, therefore, continue to help its employees through programs discussed above. Regulations forcing HFEC to provide full health care benefits to all seasonal employees, however, would force HFEC to re-evaluate its seasonal worker program likely resulting in changes, such as reduced hours, that neither the worker nor HFEC would find desirable.

## **I. Introduction and Summary**

HFEC is appreciative of the IRS addressing these important issues affecting employers of seasonal workers. A large portion of our economy is supported by such employers in various industries such as ski resorts, retail, restaurants, agriculture, fishing and tourism. The overall complexity of the Patient Protection and Affordable Care Act ("Healthcare Act") cannot be overstated. Indeed, the *Notice* seeks comments on only a very limited and distinct portion of the law, however, compliance with these provisions will have significant impact on the amount of administrative burden placed on employers such as HFEC. Other areas of the Healthcare Act are just as, if not more, burdensome. Accordingly, in addressing the issues set forth in the *Notice* HFEC strongly believes the IRS should adopt regulations that provide ease of understanding and use, flexibility in application, and certainty in business operations. Anything else will only increase regulatory burdens on an already overburdened group of employers and be disruptive to the business. For this reason, HFEC welcomes the *Notice* and is confident that it will be a catalyst resulting in clarity around these issues and eliminate potential disruption in the marketplace.

Specifically, HFEC supports the IRS's proposed alternative to allow employers to use a look-back/stability period safe harbor ("LB/SP Safe Harbor") in determining employees that would be considered full-time for a particular coverage period. A LB/SP Safe Harbor will eliminate the unnecessary hardships that employers would face in trying to comply with a month-by-month determination and will lessen confusion faced by both employees and employers regarding employees' status and eligibility to participate in employer health care plans.

Additionally, the IRS should clarify the assessable payment provisions of § 4980H (a). HFEC contends that clarification is needed in two areas. First, §§ 4980(H)(a) and (b) must be interpreted together. That is, if an employer does have a full time employee who receives a tax credit or cost-sharing reduction under a qualified health plan, that employer's assessable payment should be determined by whether the employer offers a minimum essential coverage plan to any of its full-time employees. If it does, then § 4980H (b) should apply and the assessable payment should be based only on those full time employees who do receive a tax credit or cost-sharing reduction for a qualified plan. Section 4980H (a) would not be applicable. Conversely, if the employer did not offer any of its full time employees a minimum essential coverage plan then § 4980H (a) should apply and an assessable payment should apply to all of the employer's full time employees. Second, as the *Notice* indicates, certain classes of employees should be exempt whereby the employer should not be required to offer that class of employee a minimum essential coverage plan. Without such exemptions, some employers, especially those with a large seasonal workforce, will face an administrative Armageddon trying to determine how and when employees should roll on and off the employers health plans.

Finally, the IRS should provide further clarity regarding the application of the 90 day



waiting period for enrollment. Seasonal employees with breaks in service should be treated as new employees following the break in service and not as a continuation of employment.

## **II. The IRS Should Adopt an Alternative to A Month-by-Month Basis for Determining Full-Time Employees Under § 4980H**

### **A. Determination of Full Time Employment on a Month-By-Month Basis is Impracticable and Overly Burdensome on Employers**

Although HFEC is a large employer under the Healthcare Act, it does have a significant interest in the determination of full-time employees. HFEC's business operation cycle causes its need for seasonal employees to vary significantly. In some months, HFEC may have little to no seasonal employees. In others, it may have as many as 6,000. Additionally, within each month, the schedule for its seasonal employees can vary based on weather, gas prices,<sup>2</sup> and environmental and public safety issues.<sup>3</sup> With this kind of variance it would be next to impossible for HFEC to determine its full-time employees on a month-by-month basis.

Indeed, the IRS got it completely right when it stated in the Notice that a "determination of full-time status on a monthly basis ... may cause practical difficulties for employers, employees, and the State Exchanges. These difficulties include uncertainty and inability to predictably identify which employees are considered full-time and, consequently, inability to forecast or avoid potential § 4980H liability. This issue is particularly acute in circumstances in which employees have varying hours or employment schedules (e.g., employees whose hours vary month to month or who are employed for a limited period). If employer-sponsored coverage were limited to employees who satisfied the definition of full-time employee during a month, employees might move in and out of employer coverage as frequently as monthly, which

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<sup>2</sup> Most of HFEC's properties are destination locations with a large number of its guests coming from a certain mile radius of the property. If gas prices increase precipitously, guest attendance usually falls. Thus, fewer employee hours are needed.

<sup>3</sup> HFEC also faces potential attendance fluctuations caused by such things as possible pandemics, e.g., the swine flu and bird flu.

would be undesirable from both the employee's and the employer's perspective, and could also create administrative challenges for the State Exchanges."<sup>4</sup>

This is the exact scenario HFEC faces if it is required to determine its full-time employees on a monthly basis. One can only imagine the complexity in trying to manage a system where as many as 6,000 employees must be reviewed at the end of each month to determine if each employee is eligible for the company's health benefit plan the next month and then moving those who are determined to be a full-time employee based on the prior month's hours on to the plan while moving those who are not full time employees off of the plan. This Byzantine complexity would be overly burdensome on HFEC, and all similarly situated employers, requiring an army of compliance personnel to try to ensure that one employee is not accidentally overlooked.<sup>5</sup> Moreover, given that the IRS has not yet determined how it will interpret §§ 4980(H)(a) and (b),<sup>6</sup> the ramifications of failure could be staggering. If § 4980(H)(a) is interpreted to mean that failure by an employer to offer a plan to just one full-time employee causes the employer to incur an assessable payment for all of that employer's full-time employees, HFEC would face a potentially devastating penalty each and every month. Clearly, Congress could not have intended to set businesses up for this kind of failure.

**B. A Month-By-Month Determination Causes Uncertainty for Employees and State Exchanges**

The complexity and uncertainty of a month-by-month system takes its toll not only on employers but also on employees and State Exchanges. As discussed, many variables determine a seasonal employee's hours each month. Accordingly, if a seasonal employee's full-time status is based on a month-by-month analysis, he or she could be in a constant rotation between the employer's plan and the State Exchange. It is safe to say that *no person* could possibly want to

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<sup>4</sup> Notice, Section V. Potential Methods for Determining Full-Time Employees Under § 4980H.

<sup>5</sup> This complexity is increased exponentially when you combine COBRA compliance.

<sup>6</sup> See section III. below.

be in a perpetual game of health insurance “red-rover.”

This also places a huge burden on the State Exchanges, which, in turn, will cause an escalating impact on employers. State Exchanges have yet to be created, however, they will no doubt have varying rules from state to state. The ability of any employer to maintain nation-wide or region-wide operations is severely hampered when the employer must comply with multiple sets of rules governing the exchange of employees from and to the State Exchanges. Thus, an employer’s regulatory complexity in managing healthcare will be greatly magnified when the employer operates across various state jurisdictions.

### **C. The IRS Must Implement a LB/SP Safe Harbor**

For the reasons discussed above, the IRS must implement the LB/SP Safe harbor. A LB/SP Safe Harbor will allow employers to operate within a manageable level of regulatory complexity and with some certainty about costs and potential penalties. HFEC contends that the LB/SP Safe Harbor period should be flexible and not mandated by the IRS. Some employers may need a three month look back period while others may need a year depending on their business cycles. Just as a company is typically allowed to choose its fiscal year, a company should be allowed to choose the look back period it desires. If the IRS is concerned about companies gaming the system, it could set a minimum time period before the company could change its look back period, e.g., could change the look back period only once every two years.

If the IRS sets a maximum length for the look back period, it must not set such length less than one year. Most businesses are on annual cycles and need a full business cycle for the period. Also, performing the look back will be a burdensome process and companies should not be forced to do it more than once annually.<sup>7</sup> Once again, if the IRS is concerned that companies

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<sup>7</sup> A company may choose to have a look back period that is less than one year but it should not be forced to do so by regulatory dictate.

would game the system by choosing longer look back periods, it could simply mandate that the stability period match the look back period.

Accordingly, the IRS should follow the proposal set forth in the Notice and implement a LB/SP Safe Harbor alternative to allow companies to determine its full-time employees. The LB/SP Safe Harbor will allow employers the ability to effectively manage the administrative burden and avoid penalties under § 4980H.

**D. Employees Who Work for Only Part of the Look Back Period.**

In order to be a true look back period (or “Measurement Period”), the entire time frame for the Measurement Period must be used for all employees that work during the Measurement Period, regardless of when an employee started and left employment during the Measurement Period. Pursuant to the Notice, the LB/SP Safe Harbor works as follows: (1) an employer would establish a Measurement Period; (2) at the end of the Measurement Period the employer would take the total number of hours each employee worked during the period and divide that number by the number of weeks in the Measurement Period (“Weekly Hours”); (3) all employees whose Weekly Hours exceeded 30 would be full-time employees for the stability period, while all employees whose Weekly Hours were less than 30 would not be full-time employees during the stability period. The Notice appears to be clear that regardless of when an employee starts his or her employment, the entire number of weeks in the Measurement Period should be used as the denominator in calculating the Weekly Hours. The Notice states, however, that “new employees who might not have been employed by the employer during the entire Measurement Period, or employees who move into full-time status during the year, it is currently anticipated that this safe harbor may apply only in a limited form.” HFEC is unsure what the IRS means by this statement, but for clarity purposes HFEC contends that in adopting the LB/SP Safe Harbor the

IRS must not apply the Measurement Period on some form of prorated portion. To do so would defeat the purpose of using a look back period.

The concept of a look back period clearly should apply to the company and not to each individual employee. The alternative is allowing employers to look back over a complete operating cycle to allow it to better manage its employees to avoid being subject to assessment payments. If employers are required to prorate the Measurement Period for each individual employee, the employer will once again be placed with a heavy regulatory burden of maintaining records to allow for the individual calculations. Such a rule will be a burdensome compliance quagmire, again setting employers up for failure if they miscalculate one employee. For these reasons, the IRS must allow the entire Measurement Period to apply in determining whether an employee is full-time under the LB/SP Safe Harbor.

### **III. Interpretation of Section 4980(H) Must be Consistent with the Statute and Should Exempt Classes of Employees.**

Section 4908(H)(a) if the Healthcare Act provides that in the event a “large employer *fails to offer its full time employees* the opportunity to enroll in minimum essential coverage under an eligible employer sponsored plan”<sup>8</sup> and “at least one full-time employee of the applicable large employer has been certified to the employer ... as having enrolled for such month in a qualified health plan with respect to which an applicable premium tax credit or cost-sharing reduction is allowed or paid with respect to the employee,”<sup>9</sup> then the employer is liable for an assessable payment for each full-time employee of the employer.

Section 4980(H)(b) later provides that a “large employer *offers to its full time employees* (and their dependents) the opportunity to enroll in minimum essential coverage under an eligible

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<sup>8</sup> HealthCare Act § 4980H(a) emphasis added.

<sup>9</sup> *Id.*

employer-sponsored plan”<sup>10</sup> and “one or more full-time employees of the applicable large employer has been certified to the employer ... as having enrolled for such month in a qualified health plan with respect to which an applicable premium tax credit or cost-sharing reduction is allowed or paid with respect to the employee,”<sup>11</sup> then the employer is liable for an assessable payment for each full-time employee who is receiving premium tax credit or cost-sharing reduction.

**A. Section 4980(H) Must Be Applied Consistent with the Statute**

Clearly, the two provisions contemplate a penalty for any large employer who has a full-time employee that enrolls in a qualified plan (other than the employer’s) and receives an applicable premium tax credit or cost-sharing reduction. It also seems clear that the distinction between the application of the two penalties is whether the employer offered *any* of its full-time employees an opportunity to enroll in minimum essential coverage under an eligible employer-sponsored plan. If it did not, then § 4980H (a) should apply; if it did, then § 4980H(b) should apply. Thus, § 4980H(a) should not apply if the employer fails to offer minimum essential coverage through an eligible employer-sponsored plan to a full-time employee regardless of whether the employer fails to do so by choice to a certain class of employees or fails to do so by error in determining who its full-time employees are.<sup>12</sup> The penalty should apply only to those employees who failed to receive an offer of coverage from the employer. The statutory language is very clear in the application. If an employer offers a plan to any of its full-time employees, regardless of whether that plan is applicable to all classes of full-time employees, it has met its burden under § 4980H (a). Section 4980H (b) was placed in the statute to address those full-time

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<sup>10</sup> HealthCare Act Section 4980H(b) emphasis added.

<sup>11</sup> *Id.*

<sup>12</sup> See Comments Section II.A. above about the complexity employers such as HFEC will face in making this determination and why the LB/SP safe Harbor is so vital to these employers.



employees who do not participate in their employer's plan; and, their reason for not participating could be the employer did not offer its plan to that particular class of employee or the employee preferred the State Exchange plan. Apart from the reason the employee did not participate in the employer's plan, the liability to be assessed against the employer through an assessable payment should be calculated pursuant to § 4980H (b) and not § 4980H (a). Any other interpretation would surely be subject to judicial review.

#### **B. Section 4980(H) Should Exempt Classes of Employees**

The Notice seeks comments on whether an assessable payment should be assessed against an employer for all employees that enroll in a qualified plan and receive a tax credit or cost-sharing reduction or if exceptions should be allowed. HFEC strongly supports the exception model suggested in the Notice. Specifically, HFEC contends that seasonal employees should be exceptions and employers should not be required to offer seasonal employees an opportunity to enroll in the employers sponsored plan. The reasons are fully set forth above. Seasonal employees, by the very nature of their employment, are not employed by the employer for the entire year. Instead, each year they are hired and at the end of the season they are released. They do not participate in continued employment for the entire year. Thus, without an exception for seasonal employees, the employees will be subject to potentially being constantly moved between the employers' plans<sup>13</sup> and the State Exchanges. Most of this movement can be effectively addressed through the LB/SP Safe Harbor as discussed above. The LB/SP Safe Harbor is needed for more than seasonal employees, e.g., year round part time workers. However, because of the uniqueness of seasonal employees, an exception should be created under §§4980H(a) and (b) for seasonal employees.

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<sup>13</sup> Seasonal employees often work for other employers when out of season. Thus, a seasonal employee could be subject to multiple employers' plans and State Exchanges.

#### **IV. Ninety Day Waiting Period Should Begin Again After Each Break In Service**

Consistent with all other discussion herein regarding the unique characteristics of a seasonal employee, the 90-day waiting period offers similar challenges. As pointed out in the previous section, seasonal employees always have a break in service. They are not continuous year round employees. Thus, once their service ends for the season they are released and are no longer employees of the employer under the common-law test for employment.<sup>14</sup> They are off the payroll and remain off unless they return for the next season.

Accordingly, if the IRS does not allow employers an exception for seasonal workers as requested in Section III.B. above, it should make clear that seasonal employees are to be treated as new employees each season with the 90 day wait period starting over each season. This is the only viable interpretation for the 90-day waiting period for seasonal employees given they are no longer common-law employees of an employer at the end of the season; and, if they do come back the next season, they begin the employment process over.

#### **IV. Conclusion**

In summary, the IRS should implement the proposed LB/SP Safe Harbor concept, and not limit the look back period to less than twelve (12) months. When calculating average weekly hours during the look back period, the entire number of weeks in the look back period should be used in the denominator, regardless of when the employee began or ended his seasonal employment during the look back period. Further, penalties under § 4980H(a) should apply only if an employer makes no offer of coverage to any full-time employee. Additionally, the ninety (90) day wait provision should start over any time an employee has a break in service.

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<sup>14</sup> Section III A. of the Notice states “For purposes of § 4980H, as code provisions generally, ‘employer’ would mean the entity that is the employer of an employee under the common-law test.”

Respectfully submitted,

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ENTERTAINMENT CORPORATION**

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Dated: June 17, 2011