September 27, 2012

Internal Revenue Service
CC:PA:LPD:PR (Notices 2012-58 and 2012-59)
Room 5203
Internal Revenue Service
P.O. Box 7604
Ben Franklin Station
Washington, DC 20044

Office of Health Plan Standards and Compliance
Employee Benefits and Security Admin
Room N-5653
US Department of Labor
200 Constitution Avenue, NW
Washington, DC 20210

**Re: Definition of Full Time Employee for 4980H (Notice 2012-58) and 90-Day Waiting Period (Notice 2012-59)**
**Submitted electronically to notice.comments@irscounsel.treas.gov and to e-ohpsca-er.ebsa@dol.gov**

Dear Sir or Madam:

The undersigned employers and associations kindly ask you to please consider these comments in your review of Notices 2012-58 and 2012-59 relating to provisions enacted as part of the Patient Protection and Affordable Care Act of 2010 (PPACA).

*Notice 2012-58*

Employers are seeking guidance in how to interpret various provisions of the PPACA, and perhaps none more importantly than those defining employers' responsibilities under the Act. Section 4980H of the Internal Revenue Code, as established in PPACA §1513, establishes both a measurement mechanism for determining the number of Full-Time Equivalents (FTEs) as well as a definition of full-time employee (those regularly scheduled to work 30 or more hours per week). Notice 2012-58 provides an optional safe harbor for determining whether new or seasonal/variable hour employees might meet the definition of such a full-time employee.

While the proposed optional safe harbor is helpful in certain circumstances (particularly as it applies to employees working in agriculture, retail sales and traditional seasonal businesses), it is less clear from the guidance if this safe harbor is available in equally challenging situations, such as for employees who either are scheduled for short-term assignments or who may be exempt from the Fair Labor Standards Act (FLSA), and thus hours of work are not reported by the employee nor records kept by the employer. In addition, employees hired for short-term assignments, such as interns; student-employees, or project-based individuals may regularly work 30 or more hours in a given week, but typically have not been deemed eligible for their employer's health plan due to the nature of that short-term assignment. Compensation for these individuals takes this factor into account. Under the proposed safe harbor, many individuals in these situations may or may not be deemed full-time employees after the applicable look-back period. This lack of certainty on the part of both the employer and employee needs resolution in the form of an addition to the safe harbor.

Similarly, FLSA-exempt employees (*e.g.* adjunct faculty in a university setting or a project-based professional) may work variable hours but do not track nor keep hours. In fact, under Department of Labor rules relating to the FLSA, such tracking of hours might endanger the exempt status of employees under that Act. Their work or project outcomes are defined between themselves and their employer, as is the duration of the assignment and the deliverables required. In some cases, such as adjunct faculty, employers may make

reasonable assumptions about hours based on similar work performed by traditional full-time employees, but in other cases that may not be possible. Again, the proposed safe harbor does not address many of the everyday relationships of such individuals, and either an expansion of the proposed safe harbor or a new one needs to be established to remove uncertainty on the part of both employee and employer in these situations.

Lastly, for small to medium-sized employers, this three-part safe harbor mechanism may be unwieldy in its application, with overlapping administrative and look-back periods to determine a new or variable-hour employee's determination of full-time status.

*Notice 2012-59*

This Notice provides additional clarification around the 90-day eligibility rule for enrollment in an employer's health plan as outlined in the PHS Act §2708. Unfortunately for virtually all small to medium-sized employers in the US, the most common eligibility provision in employer-based health plans today would not meet the Notice's requirements.

Due to difficulties in tracking mid-month enrollments, as well as provisions in most insurance carriers' contracts, eligibility and enrollment most typically occurs "on the first of the month coincident with or next following 90 days of employment." Thus, all newly-eligible employees are enrolled together, only once per month. Carrier billing and employer and employee contributions are thus uniformly established with a "first of the month" date rather than at the 91st calendar day following employment, causing a daily tracking of the newly eligible. From an HR and employer perspective for small to medium-sized employers, there are not systems in place to adequately administer such a shift as would be required by the interpretations in Notice 2012-59. The programming of all HRIS, payroll, and insurance carrier systems—not to mention small employers without computer-based systems—to make such a change to a mid-month eligibility date will require significantly more than the 15 months remaining before PHSA §2708 becomes effective for plan years beginning on or after January 1, 2014. The undersigned respectfully request that a safe harbor be established for purposes of §2708 recognizing that a "first of the month coincident with or next following 90-days" meets the requirements of that Section.

The undersigned thanks the Departments for considering these comments. If there are further questions relating to these comments, please contact Gary Kushner, President and CEO of Kushner & Company at (269) 342-1700. Respectfully submitted by the undersigned signatories:

Kushner & Company
Society of Human Resource Management (SHRM)
College and University Professional Association-for Human Resources (CUPA-HR)
Small Business Council of America (SBCA)
Small Business Association of Michigan (SBAM)