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**To:** ["Notice.comments@irs.counsel.treas.gov"; E-OHPSCA-ER.EBSA](#)  
**Cc:** [Monroe, Joanna](#); ["McNair-Huff, Natalie"](#); [Heck, Patrick G.](#); [Carnevale, Amy](#)  
**Subject:** Notice 2012-58: Comments Submitted by TrueBlue, Inc.  
**Date:** Friday, September 28, 2012 5:25:41 PM  
**Attachments:** [DC-#9650557-v1-TrueBlue\\_-\\_Comment\\_Letter\\_092812.PDF](#)

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To Whom It May Concern:

Please find attached comments in response to Notice 2012-58, pertaining to the determination of full-time employees for the purposes of the shared responsibility for employers regarding health coverage. The comments are being submitted on behalf of Joanna Monroe, Deputy General Counsel and Chief Compliance Officer for TrueBlue, Inc.

Please do not hesitate to be in touch with either Ms. Monroe or myself in the case of any questions or for additional information. Ms. Monroe is cc'd to this email and her contact information is included in the letter; my contact information follows. Thank you.

Best,  
Karishma Page



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Submitted electronically via [Notice.comments@irsounsel.treas.gov](mailto:Notice.comments@irsounsel.treas.gov) and [e-ohpsca-er.ebsa@dol.gov](mailto:e-ohpsca-er.ebsa@dol.gov).

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(Notices 2012-58, 2012-59)  
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Washington, D.C. 20044

Office of Health Plan Standards and  
Compliance  
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U.S. Department of Labor  
200 Constitution Ave., NW  
Washington, D.C. 20210

**RE: Determining Full-Time Employees for Purposes of Shared  
Responsibility for Employers Regarding Health Coverage (IRS Notice  
2012-58)**

To Whom It May Concern:

TrueBlue, Inc. (“TrueBlue”) is pleased to submit this letter in response to the request in Notice 2012-58 (the “Notice”) for comments on the determination of full-time employees for the purposes of the employer shared responsibility provisions (§ 4980H) of the Patient Protection and Affordable Care Act (“PPACA”).

TrueBlue is a leading supplier of temporary work. In 2011, TrueBlue connected approximately 300,000 people to work, paying nearly \$600 million in wages and serving nearly 150,000 businesses in the service, retail, wholesale, manufacturing, transportation, and construction industries. TrueBlue also employs 2,500 regular headquarter and branch staff, who are more akin to traditional employees and work on a more long-term, regular, and predictable basis. TrueBlue provides temporary blue collar and skilled work through five lines of business: Labor Ready; Spartan Staffing; CLP Resources; Plane Techs; and Centerline. The TrueBlue family of companies is committed to providing individuals with opportunities for growth and customers with the help they need to succeed in today’s competitive environment.

We appreciate the open, deliberative process and efforts to accommodate the unique and significant issues presented by PPACA’s employer shared responsibility provisions on variable employees and their employers, including temporary staffing firms. We applaud the Department of Treasury (“Treasury”) and Internal Revenue Service (“IRS”), the Department of Labor (“DOL”), and the Department of Health and Human Services (“HHS”) for the constructive approach set out in the Notice.

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We would like to take this opportunity to offer our perspective on the important issues considered in the Notice. First, in an effort to assist in the further development of guidance, this letter provides background on temporary employment. Second, the letter discusses the following aspects of the Notice:

- The proposed look-back/stability period safe harbor to determine full-time status of new and existing variable employees;
- The application of the variable employee definition to temporary employees; and
- The offer of health care coverage for eligible employees.

Additionally, we would like to note that TrueBlue has been working with the American Staffing Association (“ASA”) and the Employers for Flexibility in Health Care (“EFHC”) on these issues and would like to associate TrueBlue with ASA’s and EFHC’s submissions in response to the Notice.

## **TEMPORARY EMPLOYMENT**

### ***The Unique Nature of Temporary Employment***

Temporary employment plays a critical role in the economy by providing employment flexibility for workers and businesses. Temporary staffing firms employ more than 13 million people annually. These jobs offer millions of people the opportunity to work as the economy continues its fragile recovery. Temporary employment is critical to mitigating unemployment, while offering a significant opportunity to find permanent employment through temporary jobs. At the same time, temporary employment provides businesses with the opportunity to support or supplement their workforce in various work situations, such as employee absences, skill shortages, seasonal workloads, and special assignments or projects. Moreover, in the current economy, temporary employment is leading the jobs recovery by allowing employers to gauge business and economic conditions before committing to permanent hires.

Temporary employment is generally short-term, intermittent, variable, and unpredictable. Temporary labor does not follow the traditional employee/employer business model, in which a company hires an individual who is then considered an employee until that relationship ends, possibly years later. It is important to stress that temporary employees, not the staffing companies with which they work, determine when, how often, and how long they want to work. These individuals may work at different jobs and job sites, and assignments may last for as little as a single day or extend for several weeks or months. Many temporary employees work sporadically, based on their need for additional income. Between assignments, there is no employment relationship between the temporary employee and the staffing firm; although the temporary worker remains in the staffing firm’s employee database, he or she is not employed. In some cases, a temporary employee may work for several agencies at the same time.



In TrueBlue's experience, the average tenure of a temporary employee is approximately one month per year. However, even if someone works for us for *one day*, that person is an employee of the company rather than an independent contractor. Employee status integrates workers into the U.S. economy, ensuring that they are eligible to work in the U.S., that all workers' compensation, unemployment, and income taxes – as well as any court-ordered garnishments – are withheld and collected, and that W-2s report income accurately.

### ***Temporary Employment and Health Care***

Because temporary employment is often used as a form of supplemental employment, most temporary employees get health coverage from sources other than their employer. According to the U.S. Bureau of Labor Statistics ("BLS"), 56 percent of temporary employees are covered under the health policies of parents or spouses, by Medicare, or other government programs (BLS, Contingent and Alternative Employment Arrangements (2005)). The BLS data shows that for temporary staffing firms that find it logistically possible to offer health insurance benefits to their temporary employees, only 25 percent of temporary employees opt to take the coverage. Among short-term temporary employees, participation rates are as low as 8 percent. Employees using temporary employment as a bridge to a permanent job generally refuse coverage because they do not expect to work for long periods of time and want to maximize their cash income during their short tenure.

Moreover, the short-term, intermittent, variable, and unpredictable nature of temporary employment and the low rates of employee participation present underwriting challenges for health insurance carriers. As a result, the only health coverage most temporary staffing firms have been able to practically offer are so-called "mini-med" plans that provide limited coverage. At this time, it is unclear how temporary staffing firms will be able to offer temporary employees minimum essential coverage after the likely elimination of these plans in 2014.

### **COMMENTS**

#### ***Proposed Look-Back/Stability Period Safe Harbor***

The look-back/stability period safe harbor, as proposed in the Notice, would provide employers like TrueBlue with the necessary flexibility to reasonably implement the PPACA's employer shared responsibility provisions, increasing administerability and preventing disruption to employees' health care coverage.

The Notice outlines a practical methodology, consistent with the authority under PPACA's employer shared responsibility provisions, which would allow employers to apply up to a 12-month standard measurement period for ongoing employees, followed by up to a 12-month stability period. The Notice extends a similar framework for new employees. Specifically, for new employees that are reasonably expected to work full-time, employers must either offer health care coverage or alternatively pay the

assessments required under PPACA's employer shared responsibility provisions. However, for new variable hour and seasonal employees who are not reasonably expected to work full-time, the Notice would allow an initial measurement period of up to 12 months, followed by up to a 12-month stability period, with a transition period so the new employee would be able to catch up to the standard measurement period for ongoing employees.

Allowing a longer measurement period for new variable hour and seasonal employees is imperative, particularly in the temporary staffing context. As noted previously, temporary employment generally is short-term, intermittent, variable, and unpredictable. Such a measurement period ensures that an employee has made a sufficient connection with his or her employer and that there is intent to work on a full-time and ongoing basis. Moreover, allowing a longer measurement period not only improves plan administration, but also reduces churn between employer and Exchange coverage, thereby minimizing disruption on employee coverage, access to providers, and annual benefits.

#### *Application of Variable Employee Definition to Temporary Employees*

We appreciate the Notice's request for comments on the types of safe harbor methods that should be available 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."

On rare occasions, there are some temporary staffing arrangements in which the temporary employee is reasonably expected to work on a full-time basis. As per the approach outlined in the Notice, temporary staffing firms would either have to offer health care coverage or, alternatively, pay the assessments required under PPACA's employer shared responsibility provisions for these new, non-variable hour employees.

However, for the vast majority of temporary employees, their employment will be short-term, intermittent, variable, and unpredictable. Consequently, most temporary employees would fall within the definition of "variable hour employees."

These temporary employees and their temporary staffing arrangements share several characteristics. First, the temporary staffing firm does not control the employer-employee relationship. As noted previously, it is the temporary employees, not the staffing firms with which they work, that determine when, how often, and how long they want to work. In many such cases, assignments are provided on a daily basis and temporary employees are paid at the end of each day. Additionally, the relationship is subject to control by a third party – the temporary staffing firm's client – which determines the hours and length of projects.

Second, it is difficult to provide health care coverage for such temporary employees. From an administerability perspective, because such temporary employees control their own schedules, it is difficult to actually enroll them to make the necessary



payroll deductions for any premium cost-sharing. Moreover, there are few, if any, health coverage options available to cover these employees; plans that are available are typically “mini-med” plans that provide limited coverage and may not be available in the near future.

As future guidance is considered, it would be helpful to include further guidance on temporary employees. Similar to the construction on seasonal employees, such guidance could clarify that, for a temporary employee who is not reasonably expected to work on a full-time basis, where the temporary staffing firm does not control the employer-employee relationship, and the provision of health care coverage presents administerability difficulties and there are limited health care coverage options, such an employee meets the definition of a variable hour employee. Additionally, it would be helpful to provide examples, along the lines below.

**Example** . (12-Month Initial Measurement Period; 1+ Partial Month Administrative Period).

**(i) Facts.** Employer A is a temporary staffing firm. Temporary work assignments are made available based on demand by Employer A’s clients. Employer A’s temporary employees determine when, how often, and how long they would like to work. Employer A uses a 12-month initial measurement period for new variable hour employees that begins on the employees’ start date and applies an administrative period from the end of the initial measurement period through the end of the first calendar month beginning after the end of the initial measurement period. Employer A hires Employee T, a temporary employee, on November 15, 2014. Employer A determines that Employee T is a temporary employee who is not reasonably expected to work on a full-time basis and, consequently, is a variable hour employee. Employee T works intermittently from November 15, 2014 through June 14, 2015. From November 15, 2014 through June 14, 2015, Employee T does not work an average 30 hours per week. Further, Employee T is not reasonably expected to work an average 30 hours per week for the 12-month initial measurement period. Accordingly, Employer A does not treat Employee T as a full-time employee, and does not offer Employee T coverage.

**(ii) Conclusion.** Employer A (1) does not have a reasonable expectation that Employee T will work full-time; (2) uses an initial measurement period that does not exceed 12 months; (3) uses an administrative period totaling not more than 90 days; and (4) uses a combined initial measurement period and administrative period that does not extend beyond the final day of the first calendar month that begins on or after the one-year anniversary of an employee’s start date. Accordingly, from Employee T’s start date through November 14, 2015, Employer A is not subject to any payment under § 4980H because Employer A complies with the standards for the initial measurement period and stability periods for a new variable employee with respect to Employee T. PHS Act § 2708 does not apply to Employee T during this period because, pursuant to the

plan's eligibility conditions, Employee T does not become eligible during this period for coverage under the plan. Accordingly, Employer A also complies with PHS Act § 2708 with respect to Employee T during this period.

**Example** . (12-Month Initial Measurement Period; 1+ Partial Month Administrative Period).

**(i) Facts.** Employer B is a temporary staffing firm. Temporary work assignments are made available based on demand by Employer B's clients. Employer B's temporary employees determine when, how often, and how long they would like to work. Employer B uses a 12-month initial measurement period for new variable hour employees that begins on the employees' start date and applies an administrative period from the end of the initial measurement period through the end of the first calendar month beginning after the end of the initial measurement period. Employer B hires Employee U, a temporary employee, on September 15, 2014. Employer B determines that Employee U is a temporary employee who is not reasonably expected to work on a full-time basis and, consequently, is a variable hour employee. Employee U works intermittently from September 15, 2014 through September 14, 2015. During the 12-month initial measurement period, Employee U works an average 30 hours per week. Accordingly, Employer B treats Employee U as a full-time employee, and offers Employee U coverage for the stability period that runs from November 1, 2015 to October 31, 2016.

**(ii) Conclusion.** Employee U works an average of 30 hours per week during his initial measurement period and Employer B uses: (1) an initial measurement period that does not exceed 12 months; (2) an administrative period totaling not more than 90 days; and (3) a combined initial measurement period and administrative period that does not extend beyond the final day of the first calendar month that begins on or after the one-year anniversary of an employee's start date. Accordingly, from Employee U's start date through September 14, 2015, Employer B is not subject to any payment under § 4980H because Employer B complies with the standards for the initial measurement period and stability periods for a new variable employee with respect to Employee U. Employer B also complies with PHS Act § 2708.

### ***Offer of Health Care Coverage for Eligible Employees***

One additional issue for clarification is the offer of health care coverage for eligible employees. We appreciate the Notice's inclusion of an Administrative period to accommodate eligibility determination, notify eligible employees, and enroll eligible employees in coverage. As further guidance is considered, it would be helpful to clarify that the Administrative period would also serve as the period during which the employer's offer of health care coverage would be made to eligible employees for coverage during the entire subsequent stability period. This would ensure that eligible



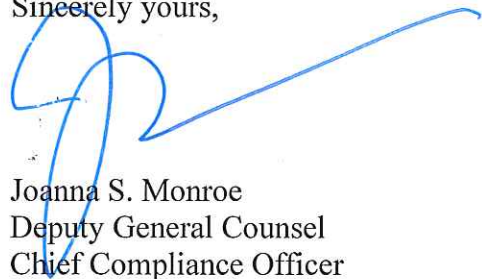
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employees electing health care coverage would be able to do so at a pre-determined time, rather than allowing for rolling enrollment during the stability period.

**CONCLUSION**

Thank you for the open, deliberative process and the opportunity to comment on the Notice. We appreciate the recognition of the unique issues for temporary employment raised by PPACA's employer shared responsibility provisions and commend the constructive approach set out in the Notice for new and existing variable employees. TrueBlue looks forward to working with you on these important issues.

Sincerely yours,



Joanna S. Monroe  
Deputy General Counsel  
Chief Compliance Officer  
TrueBlue, Inc.