



AFTRA Health & Retirement Funds

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September 29, 2012

**By e-mail (e-ohpsca-er.ebsa@dol.gov and notice.comments@irs.counsel.treas.gov)**

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

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

Re: DOL Technical Release 2012-02 and IRS Notices 2012-58 and 2012-59

To Whom It May Concern:

The AFTRA Health Fund (the Fund) submits these comments on IRS Notice 2012-58<sup>1</sup> and Notice 2012-59, which address the ban on waiting periods of more than 90 days and the employer responsibility provisions of the Patient Protection and Affordable Care Act (the Affordable Care Act or the Act). We thank the Departments for the opportunity to comment on a matter of critical importance to the Fund and the multiemployer plan community in general.

### **Background**

The Fund is a multiemployer plan, established and maintained pursuant to collective bargaining agreements and operated through a stand-alone trust managed by a joint labor-management Board of Trustees. The Fund was established in the 1950's and now offers health and benefits coverage to performers in broadcast, public and cable television (including news, sports and weather, drama and comedy, soaps, talk and variety shows, documentaries, children's programming, reality and game shows); radio (news, commercials and hosted programs); the sound recording industry; Internet and digital programming; television and radio advertising; non-broadcast video and interactive video games. As of January 2012, 8,985 participants and

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<sup>1</sup> References to Notice 2012-59 are intended to include references to DOL Technical Release 2012-02 and the parallel Bulletin issued by the Department of Health and Human Services.

8,140 dependents were enrolled for coverage. The Fund has over 2,500 signatory employers that make contributions to the Fund pursuant to collective bargaining agreements with SAG-AFTRA.

The Fund provides a comprehensive array of benefits including hospital, major medical, surgical, wellness, prescription drug, dental, mental health and chemical dependency and life insurance. Individuals qualify for twelve (12) months of coverage once they earn \$10,000 in covered earnings in up to four consecutive calendar quarters or less. Individuals pay \$127 per month in premium toward the cost of their coverage, and those who qualify for family coverage with covered earnings of \$30,000 in up to four consecutive calendar quarters or less pay just over \$266 per month if they choose to cover a family of four or more.

### **Overview of Comments**

The Fund cites to its comment letter, dated April 9, 2012 (the Prior Comments, copy attached), in which it made certain requests related to the 90-day waiting period and the shared responsibility provisions. The Fund continues to believe that the relief requested in the Prior Comments is appropriate and reiterates its comments.

To the extent that the requests made therein are not adopted, the Fund makes the following comments with respect to Notices 2012-58 and 2012-59. The Fund believes that its eligibility provisions provide coverage consistent with the intent of the Notices. However, due to the unique nature in which multiemployer plans in general and entertainment industry plans in particular operate, there is some ambiguity as to the application of the rules set forth in the Notices. In addition, we respectfully request certain modifications that will accommodate the unique aspects of these plans but at the same time not undermine the underlying intent of the Notices. Failure to grant modifications will ultimately reduce coverage and potentially undermine the viability of multiemployer plans generally. Accordingly, certain clarifications and modifications are requested to address these issues.

Specifically, these comments request the following:

#### 90-day waiting period

- The 90-day waiting period should be deemed satisfied as long as coverage commences on the first of the month coincident with or next following the completion of a 90-day period after eligibility is established.
- The Departments should confirm that an eligibility condition in a multiemployer plan that an employee earn a specific amount of covered earnings within a specified period of no longer than four calendar quarters in order to participate in the plan is neither based solely on the lapse of time nor designed to avoid compliance with the 90-day waiting period limitation.
- If the Departments do not confirm the rule in the prior bullet, multiemployer plans that condition eligibility on a specified amount of covered earnings should be permitted to apply Section III.B. of Notice 2012-59 using covered earnings in lieu of hours worked.

- Certain changes should be made to allow multiemployer plans to apply Section III.B. of Notice 2012-59. These include the following:
  - The Departments should modify for multiemployer plans the rules regarding determining the measurement period as set forth in the comments below with respect to the shared responsibility provisions.
  - The Departments should provide an administrative rule that permits multiemployer plans to use a measurement period that begins with the beginning of the period for which contributions are received.
  - The Departments should eliminate for multiemployer plans the requirement that the coverage be made effective no later than 13 months from the employee's start date (plus the time remaining until the first day of the next calendar month). Stated differently, the 13-month rule should be a 15-month rule, meaning that multiemployer plans with a 12-month measurement period should be permitted to have a period of three additional months before coverage must commence.

#### Shared Responsibility

- As set forth in the Prior Comments, contributing employers to multiemployer health plans should be exempt from the free-rider penalty with respect to collectively bargained employees for whom the employer makes collectively bargained contributions to such multiemployer health plans. Alternatively, the free-rider penalty should not apply with respect to any collectively bargained employee (for whom the employer has made contributions to a multiemployer health plan, whether newly hired or otherwise) for the period in which the employee has not yet satisfied the eligibility requirement or during the following 90-day waiting period, provided that the plan's eligibility rules impose a measurement period (for any collectively bargained employee) of no greater than one year.
- The guidance should make clear that measurement and stability periods may differ in length or in their starting and ending dates between collective bargaining units, not merely between collectively bargained and non-collectively bargained employees to the extent the units are covered by different multiemployer plans. (For example, the employer may use different periods for employees subject to a collective bargaining agreement with an electricians' union and those subject to a collective bargaining agreement with an actors' union because the actors' and the electricians' health plans will have different eligibility rules and waiting periods that are not under the employer's control.)
- In addition, in the case of an employer contributing to a multiemployer plan, as long as the plan uniformly and consistently applies eligibility rules based on measurement and stability periods, the employer may use such periods for employees for whom it contributes to the plan, even if the actual measurement and stability periods differ within the plan for particular employees.

- By way of example, the AFTRA Health Plan provides that one year of coverage will initially commence one quarter after an employee earns \$10,000 in covered employment (which is generally equivalent to less than 30 hours a week) in any four-quarter period (or less). The Plan thereby effectively provides for quarterly rolling one-year measurement periods for every employee (although the requirement can be completed in less than one year, in which case initial coverage begins before the one-year period expires). Once eligibility is achieved, the participant will have established a four-quarter ongoing measurement period for continued eligibility for successive one-year stability periods, regardless of the participant's continued employment. This is applied uniformly to all employees in the plan other than full-time station staff and union staff, although some employees' ongoing measurement periods will begin January 1, whereas others' will be April 1, July 1, or October 1, depending on the quarter in which they initially became eligible. Under the proposed rule, an employer contributing to this Plan would satisfy the shared responsibility requirement for these employees even though the employees may have different measurement periods.
- The rule stating that the measurement period and the administrative period may not extend beyond the last day of the first calendar month on or after the one-year anniversary of the employee's start date should be eliminated for multiemployer plans.
- An employer should be treated as satisfying the employer mandate with respect to a collectively bargained employee if it contributes to a multiemployer plan that bases eligibility on a reasonable amount of covered earnings as a proxy for, and instead of, hours. Otherwise, the Treasury Department and the IRS should create an equivalency where an employer contributes to a multiemployer plan that bases eligibility on covered earnings, rather than hours. An example of such an equivalency could be that the determination of the full-time or part-time status of an employee can be based on the hours derived from dividing the covered earnings reported to the plan by the hourly rate of pay in the collective bargaining agreement or, if none exists, the average hourly rate of pay in any collective bargaining agreement providing for contributions to the plan for similar work (or, if none, for the plan generally).

### **Comments Regarding 90-Day Waiting Period**

The background and unique issues related to multiemployer health plans, as well as the eligibility rules of the Fund are set forth in detail in the attached Prior Comments, which we incorporate herein by reference. Set forth below are specific comments addressing the provisions of Notice 2012-59.

***1. The 90-day waiting period should be deemed satisfied as long as coverage commences on the first of the month coincident with or next following the completion of a 90-day period after eligibility is established.***

The Prior Comments requested that a period of three (3) consecutive months be treated as the equivalent of 90 days so that enrollment can take effect at the start of a month, as is typically the

case today. Since most multiemployer health plans, particularly those that use measurement periods for freelance or casual work, measure eligibility in monthly or quarterly increments and base their programming on this standard, a strict 90-day provision would be extremely disruptive, forcing plans to start coverage on the 28<sup>th</sup> or 29<sup>th</sup> day of the month. There is little to be gained from such disruption, given that the difference between 90 days and a calendar quarter is, at most, a few days, and that in multiemployer plans the lack of initial coverage is made up as part of the “tail” that provides coverage beyond the termination of employment.

To the extent that the Departments do not believe they have the authority to interpret the term “90 days” to mean three consecutive months, the Departments can address this issue simply by instead stating that the period between a 90-day waiting period and the first day of a month is not considered part the waiting period.

***2. The Departments should confirm that an eligibility condition in a multiemployer plan that an employee earn a specific amount of covered earnings within a specified period of no longer than four calendar quarters in order to participate in the plan is neither based solely on the lapse of time nor designed to avoid compliance with the 90-day waiting period limitation.***

As discussed in the Prior Comments, many multiemployer plans, including the Fund, have established eligibility rules reflecting the fact that there is no simple paradigm to coordinate health coverage and the variations of employment in their particular industries. This creates the necessity for multiemployer plans to establish rules that make sense within the context of industry work patterns not under the plans’ control. These rules existed long before health reform and, in many cases, have no tie to length of service. They were clearly not intended to avoid a 90-day waiting period limitations that did not exist when the rules were established.

For example, as discussed in the Prior Comments, for employees other than those employed full-time by a broadcast station or the sponsoring Union, the Fund requires that an employee have \$10,000 in earnings in any trailing four-quarter period (even if the employee was not employed during the full trailing four-quarter period). For a substantial number of participants in the Fund, earnings do not have a relationship to a particular period of service or hours worked. A performer could earn \$10,000 based on a one-hour performance or a performer could earn it over a period of a year, working a few hours a month in a small role.

So, for example, if an actor commences employment on September 30 and earns \$10,000 that day, the employee will become eligible for one year of coverage beginning January 1. This coverage is available even if the employee never works another day after September 30. (The only reason for the one-quarter delay is that the Fund will not receive or process any contributions or information about the employee’s work until the October 1 to December 31 quarter.)

Of course, another possibility is that the actor will need a longer period to establish eligibility. For example, an actor hired January 1 who appears only sporadically in a covered show and also performs in a variety of commercials throughout the year, earning \$4,000 a quarter, would not establish eligibility until the July to September quarter (as did the actor in the prior example) and would then become covered the following January 1.

These two examples demonstrate that the eligibility rule may result in situations in which the participant commences coverage within 90 days (plus the period to the first of the next month) of the date he/she met the eligibility conditions and others in which it takes longer to commence coverage. The differing results demonstrate that the period used to establish eligibility is not based solely on the lapse of time – two different people achieved eligibility at completely different times because the eligibility is based on earnings, rather than time. In addition, it is clearly not designed to avoid the 90-day prohibition, but rather is to determine eligibility.

Further evidence that this eligibility condition is not designed to avoid the 90-day prohibition is the fact that any period in which the participant is establishing eligibility is made up for in the “tail” period, meaning that the participant receives coverage for one full year, even if the participant is no longer employed. It bears noting that the existence of a rule like this in the multiemployer plan community demonstrates that the Departments should not apply a one-size-fits-all mentality to multiemployer plans and treat them in the same manner as single employer plans because the same rules do not make sense in that context.

For these reasons, we respectfully request that the Departments clarify that an eligibility condition in a multiemployer plan that an employee earn a specific amount of covered earnings within a specified period of no longer than four consecutive quarters in order to participate in the plan is neither based solely on the lapse of a time period nor designed to avoid compliance with the 90-day waiting period limitation.

***3. If the Departments do not confirm the rule in item 2 above, multiemployer plans that use a specified amount of covered earnings as a plan eligibility condition should be permitted to apply Section III.B. of Notice 2012-59 using covered earnings in lieu of hours worked.***

As described in item 2, the period prior to satisfaction of an eligibility condition based on covered earnings should not be counted as a waiting period because it is a bona fide eligibility condition that is not based solely on the passage of time. To the extent that the Departments disagree with this conclusion, they should permit multiemployer plans with these eligibility provisions to apply Section III.B. of Notice 2012-59 by considering covered earnings rather than hours as the eligibility criteria, and, like those based on hours, should not count the measurement periods as part of the waiting period.

A multiemployer plan should be permitted to use any reasonable amount of covered earnings in applying the measurement period. (The reasonableness of the Fund’s period is discussed in the shared responsibility comments below.) In case that proposal is not adopted, we have also set forth in the shared responsibility comments below a proposal for an equivalency that could be used to convert covered earnings to hours for this purpose.

***4. Certain changes should be made to allow multiemployer plans to apply Section III.B. of Notice 2012-59. These include (a) modifying for multiemployer plans the rules regarding determining the measurement period as set forth in the comments below with respect to the shared responsibility provisions; (b) eliminating for multiemployer plans the requirement that the coverage be made effective no later than 13 months from the employee’s start date (plus the time remaining until the first day of the next calendar month); and (c) providing an***

***administrative rule that permits multiemployer plans to use a measurement period that begins with the beginning of the period for which contributions are received.***

*(a) Uniform measuring period*

The Departments should modify the rules regarding determining the measurement period as set forth in the comments below with respect to the shared responsibility provisions. In order to administer the plan on a uniform basis in light of the multiplicity of employers and variable work pattern of a particular employee among those employers, revisions are needed to the measurement and, as described below, stability periods. While a uniform measurement period is appropriate in the single employer context, it does not work in a multiemployer context where uniform eligibility rules must be established for employees of multiple employers. Set forth in our comments regarding the shared responsibility provisions is a proposal for modifying the periods with respect to multiemployer plans in a manner that will create a workable mechanism, while still achieving the goals of the statute and guidance.

*(b) Changing 13-month rule to 15-month rule*

The Departments should eliminate for multiemployer plans the requirement that coverage be made effective no later than 13 months from the employee's start date (plus the time remaining until the first day of the next calendar month). The Departments have already concluded that a 12-month measurement period is appropriate. However, multiemployer plans would not be able to use a 12-month period unless the requested change is made.

As noted above, unlike single employer plans, multiemployer plans do not have access to employee work records on a real-time or close to real-time basis. Accordingly, multiemployer plans do not know an employee's work history until it is reported by the employer. The employer must gather the information and send it to the plan, which usually occurs at least weeks and more often months after the work is performed. Once the plan receives the information, it then must aggregate the information from many (in the Fund's case, thousands of) of employers and process it to determine eligibility. For any mid to large-sized multiemployer plan (particularly ones, such as the Fund here, with a mobile workforce), it is not possible to accomplish this eligibility determination in one month, which is why so many multiemployer plans with this pattern of employment have a one-quarter lag in coverage. Thus, if the 13-month rule applied to multiemployer plans, the plans would not be able to use a 12-month measurement period, which is a period with which the Departments have already expressed their comfort.

In addition, eliminating the 13-month rule would actually enhance coverage, rather than reduce it as in a single employer plan, because the participants will still be covered for an entire year (even if they are no longer employed), and the quarter lag will still be used to determine eligibility for the next four-quarter cycle.

*(c) Measurement period beginning with period for which contributions are received*

Multiemployer plans do not know an employee's "start date" because -- unlike corporate plans -- the multiemployer plan has no employer/employee relationship with the individual and is not

involved in hiring of employees. Multiemployer plans find out an individual has been hired in covered employment when the contributing employer sends in the contributions for the new employee's work as required by the collective bargaining agreement. The relevant period for purposes of the plan is the period for which contributions are made. Consequently, multiemployer plans should be permitted to use the beginning of the period for which contributions are received as the "start date" for purposes of administering the 90-day rule.

### **Comments Regarding Shared Responsibility Provisions**

***1. Contributing employers to multiemployer health plans should be exempt from the free-rider penalty with respect to collectively bargained employees for whom the employer makes collectively bargained contributions to such plans. Alternatively, the free-rider penalty should not apply with respect to any collectively bargained employee (for whom the employer has made contributions to a multiemployer health plan, whether newly hired or otherwise) for the period in which the employee has not yet satisfied the eligibility requirement or during the 90-day waiting period, provided that the plan's eligibility rules impose a measurement period (for any collectively bargained employee) of no greater than one year.***

The rationale behind this proposal is set forth in detail in the Prior Comments and not repeated here.

***2. The guidance should make clear that measurement and stability periods may differ in length or in their starting and ending dates between collective bargaining units, not merely between collectively bargained and non-collectively bargained employees.***

Notice 2012-58 permits employers to use measurement and stability periods that differ in length or starting and ending dates for the categories of collectively bargained and non-collectively bargained employees. The Treasury Department and IRS thus correctly recognized that the terms and conditions of a collective bargaining agreement provide an independent business justification for treating collectively bargained employees distinctly.

We believe that the logical conclusion (and, likely, the intention) is to allow the measurement and stability periods to differ not just between the categories of collectively bargained and non-collectively bargained employees, but also among different collective bargaining units (at the very least where the units are covered by different multiemployer plans).

Thus, for example, the employer may use different periods for employees subject to a collective bargaining agreement with an electricians' union and those subject to a collective bargaining agreement with an actors' union because the actors' and the electricians' health plans will have different eligibility rules and waiting periods that are not under the employer's control.

It would be anomalous for the Treasury Department and IRS to create a distinction between collectively bargained and non-collectively bargained employees but not among those working under different collective bargaining agreements, as the only rationale for creating the former distinction is that the terms of a collective bargaining agreement may create a business need for the distinction.



However, since the explicit language is ambiguous in that regard, we respectfully request that it be clarified in this manner.

***3. In the case of an employer contributing to a multiemployer plans, as long as the plan uniformly and consistency applies an eligibility rule based on measurement and stability periods, the employer may use such periods for employees for whom it contributes to the plan, even if the actual measurement and stability periods differ within the plan for particular employees.***

Notice 2012-58 currently requires that a particular employer use the hire date as the start of the first measurement period and then a uniform and consistent measurement period thereafter (beginning with the measurement period within which the anniversary of employment falls).

Since multiemployer plans have multiple (sometimes thousands, as in the case of the Fund) contributing employers, it is impossible for them to create eligibility rules that coincide with the requirements of a particular employer. Rather, a multiemployer plan must establish a uniform system to determine eligibility.

Typically, they do so by creating stability and measurement periods similar to those provided for in Notice 2012-58. While these periods are uniformly applied to participants, they cannot by their nature be tailored to a particular employer. In addition, many plans, including the Fund, have rolling measurement and stability periods. This works in an employee's favor, as it allows the employee to gain initial coverage in advance of the end of a measurement period.

Were an employer not allowed to rely on the multiemployer plan's measurement and stability periods, the result would be that the employer would be required to contribute to a plan for health coverage and also provide such coverage separately (or pay a penalty) because the plan's coverage periods do not quite coincide with the employer mandate. This could result in employers refusing to participate in a multiemployer plan.

The period for which the multiemployer plan provides coverage is generally greater than it would otherwise be because the multiemployer plan typically continues to provide coverage during the coverage period even after termination of employment. In addition, as noted in the Prior Comments, multiemployer plans often cover many more than full-time employees. The Fund is a good example in that it covers for an entire year all participants who have \$10,000 in earnings in any four-quarter period (or less). Even if there were a way to determine the number of hours these employees work, it is clear from the low level of earnings that those just fulfilling this eligibility rule work far less than an average of 30 hours per week for a year. Were an employer to take benefits in-house and only provide health coverage only to its full-time employees, there would be far less employees receiving coverage. Clearly, that is not the intent of the Act.

The Fund's solution to this is simple. Where an employer contributes to a multiemployer plan, the employer should be permitted to use the measurement and stability periods provided by the plan even if the actual measurement and stability periods differ within the plan for particular

employees based on their work history. An example of how this would work is set forth in the Overview of Comments section above.

To the extent that the Treasury Department and IRS believe that such a rule would create an auditing burden, we respectfully suggest that they reconsider the recommendation in the Fund's Prior Comments to create a rule that the shared responsibility provisions are satisfied with respect to employees with respect to whom they contribute to multiemployer plans. This will be much simpler for the IRS to audit and will accomplish the goals of the shared responsibility provisions since virtually every multiemployer plan provides coverage to full-time employees, albeit with slightly different (typically more generous) timing.

We believe that it is essential that the Treasury Department and IRS adopt either the recommendation in this comment letter or the recommendation in the Prior Comments. As noted above, otherwise, employers are likely to abandon multiemployer plans because multiemployer plans cannot fashion their eligibility provisions to satisfy the needs of each employer to provide coverage at particular times. Since multiemployer plans have generous eligibility provisions – e.g., pooling service to allow coverage even for those who do not work full-time for one particular employer, often having eligibility rules that cover those working less than full-time in any case and covering for stability periods that extend beyond termination of employment – the evisceration of multiemployer plans will result in far fewer people being covered, which is the precise opposite of the statutory and regulatory goal.

***4. With respect to variable hour employees, the rule stating that the measurement period and the administrative period may not extend beyond the last day of the first calendar month on or after the one-year anniversary of the employee's start date should be eliminated for multiemployer plans.***

As discussed above in connection with the 90-day waiting period limitation, the Treasury Department and IRS have already concluded that a 12-month measurement period is appropriate. As with the 13-month rule discussed above, were the requested change not made, multiemployer plans would not be able to use a 12-month measuring period because of the time it takes to get reports and contributions from each employer, process the information from multiple employers and make eligibility determinations.

Thus, for the reasons set forth above, in order to allow multiemployer plans to use a 12-month measurement period, we respectfully request this modification. As noted in connection with the 90-day rule, such a proposal merely shifts coverage periods and does not result in less coverage being provided because most multiemployer plans provide coverage for the entire stability period even after termination of employment.

***5. An employer should be treated as satisfying the employer mandate with respect to a collectively bargained employee if it contributes to a multiemployer plan that bases eligibility on a reasonable amount of covered earnings as a proxy for, and instead of, hours. Otherwise, the Treasury Department and IRS should create an equivalency where an employer contributes to a multiemployer plan that bases eligibility on covered earnings, rather than hours.***

As described in the Prior Comments, the use of hours to determine full-time status is problematic in the entertainment industry. The Fund does not receive any information regarding hours worked and, accordingly, could not establish eligibility rules based on full-time status as narrowly defined to include hours alone, without an equivalency.

The reason that the Fund does not receive this information is that the employers generally do not have it and, in most cases, could not obtain it. Most performers are not paid by the hour or for a specific number of hours worked, but are paid based on the project performed. For that reason, many employers simply do not, and often cannot, track hours. It would be difficult or impossible for an employer to determine the number of hours worked on many projects. For example, record labels have no access to or industry-related reason to keep track of the number of hours a royalty artist works. There are also situations in which third-party companies (called paymasters) handle the payroll for employers and make payments to performers and the funds, making the tracking of hours a further step removed. Sometimes the producer or the artists handle it.

The simple solution to address this issue is for the Treasury Department and IRS to provide that an employer satisfies the employer mandate with respect to a collectively bargained employee if it contributes to a multiemployer plan that bases eligibility on a reasonable amount of covered earnings as a proxy for, and instead of, hours.

The Fund's case is a perfect example. If a performer earns at least \$10,000 in covered earnings during a 12-month earnings cycle, his or her coverage is established and continued. We believe that this is a low enough threshold that the Fund would be covering anyone who was truly working 30 hours per week for 52 weeks in covered employment (*i.e.*, 1,560 hours). For someone to work 1,560 hours and not earn \$10,000 would mean that the individual was earning less than \$6.41 per hour. This would justify a rule that any employer contributing to the plan would satisfy the shared responsibility provisions.

If the Treasury Department and IRS elect not to establish such a rule, they should create an equivalency where an employer contributes to a multiemployer plan with earnings-based, rather than hours-based, eligibility. By way of example of a possible equivalency, the determination of the full-time or part-time status of such an employee can be based on the hours derived from dividing the covered earnings by the hourly rate of pay in the collective bargaining agreement or, if none exists, the average hourly wage in a collective bargaining agreement providing for contributions to the plan for a similar job classification (or, if none, in the plan).

For example, assume that the hourly rate in a collective bargaining agreement is \$10 per hour and an employee has \$10,000 in covered earnings over one year. The employee would be deemed to have 1,000 hours ( $\$10,000/\$10$  per hour) in the one-year period. While the particular individual may not be paid hourly, the hourly pay for those who are paid by hours gives some comfort as to the appropriate equivalency. We note again that in this case, the Fund will end up covering individuals as long as they work at least 1,000 hours a year ( $\$10,000/\$10$  per hour = 1,000 hours). Since 1,000 hours in a four quarter period is well below an average 30 hours per week for 52 weeks, the shared responsibility mandate would be more than satisfied.

Effectively, either of these rules would allow employers that do not or cannot track hours due to the nature of the industry to establish by other means that the multiemployer plan is covering at least those who are working an average of 30 hours. Absent such a rule, multiemployer plans in this industry could not establish eligibility rules that coordinate with the coverage mandates. Were they not able to do so, this would clearly frustrate the underlying purposes of the statute to provide coverage to the uninsured. By way of example, by establishing eligibility rules as it has, this Fund is able to provide health coverage for an entire year to individuals with low levels of covered earnings, a group that is often not able to enjoy employer-sponsored coverage nor able to afford individual coverage in the insurance market.

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We appreciate the opportunity to submit comments on these important issues. Please do not hesitate to contact me at 212-499-4821 if you have any questions about our comments or need additional information.

Respectfully submitted on behalf of the Board of Trustees,

Christine Dubois  
Chief Executive Officer



AFTRA Health &amp; Retirement Funds

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April 9, 2012

Department of Labor  
Washington, DC

Re: Notice 2012-17

To Whom It May Concern:

The AFTRA Health Fund (the Fund) submits these comments on Notice 2012-17, which addresses certain issues related to implementation of the Patient Protection and Affordable Care Act (the Affordable Care Act or the Act). Any reference in this comment letter to Notice 2012-17 similarly refers to the Department of Labor's Technical Release 2012-01.

The Fund is a multiemployer plan, established and maintained pursuant to collective bargaining agreements and operated through a stand-alone trust managed by a joint labor-management Board of Trustees. The Fund was established in the 1950's to provide benefits for actors, broadcasters, voice professionals and others in the performing arts who work under collective bargaining agreements between the American Federation of Television and Radio Artists (AFTRA) and various employers. The Fund has expanded its coverage base over the years, and now offers coverage to performers in broadcast, public and cable television (including news, sports and weather, drama and comedy, soaps, talk and variety shows, documentaries, children's programming, reality and game shows); radio (news, commercials and hosted programs); the sound recording industry; Internet and digital programming; television and radio advertising; non-broadcast video and interactive video games. As of January 2012, 8,985 participants and 8,140 dependents were enrolled for coverage. The Fund has over 2,500 signatory employers that make contributions to the Fund pursuant to collective bargaining agreements.

The Fund provides a comprehensive array of benefits including hospital, major medical, surgical, wellness, prescription drug, dental, mental health and chemical dependency and life insurance. Individuals qualify for coverage once they earn \$10,000 in covered earnings in up to four consecutive calendar quarters or less. Individuals pay \$121 per month in premium toward the cost of their coverage, and those who qualify for family coverage pay just over \$232 per month if they choose to cover a family of four or more.

### **Overview of Comments**

These comments respond to Notice 2012-17 and address the Act's ban on waiting periods of more than 90 days, as well as the employer responsibility provision (the free-rider penalty) imposed on large employers.



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As explained more fully below, we ask the Treasury Department and the IRS to:

- Not start the waiting period's 90-day clock until the end of the eligibility period used to determine whether the participant has sufficient earnings, as designated by the multiemployer plan's eligibility rules, to become eligible for health coverage through the multiemployer plan, and allowing such eligibility period to extend up to 12 months.
- Treat three (3) consecutive months as the equivalent of 90 days so that enrollment can take effect at the start of a month, as is typically the case today.
- Exempt contributing employers from the free-rider penalty *with respect to collectively bargained employees for whom the employer makes collectively bargained contributions to a multiemployer health plan*. This means that such employees
  1. would not be counted in determining whether the employer is large enough to be subject to the free-rider penalty;
  2. would be treated as enrolled in coverage within the meaning of Code Section 4980H; and
  3. would be disaggregated from the employer's other employees for the purposes of Code Section 4980H and therefore not be taken into account in determining how much is owed, if the penalty applies with respect to the employer's non-bargained employees.
- To the extent that the suggestion in the preceding bullet point is not adopted, at the very least, the free-rider penalty should not apply with respect to any collectively bargained employee (for whom the employer has made contributions to a multiemployer health plan, whether newly hired or otherwise) for the period in which the employee has not yet satisfied the eligibility requirement or during the 90-day waiting period, provided that the eligibility requirement is not designed to avoid compliance with the 90-day waiting period limitation (consistent with our recommendation above).
- If at any point full-time employment were a criterion for determining whether the free-rider penalty applied, the Departments should also adopt an alternative definition of full-time employment based on cumulative earnings within a period of no less than 12 months (to address the fact that in certain types of work in the entertainment industry, it is difficult or impossible to determine the hours worked).



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## **Waiting Periods**

### 1. Background

Public Health Service (PHS) Act section 2708, as added by the Affordable Care Act, provides that a group health plan shall not apply any waiting period that exceeds 90 days. PHS Act section 2704(b)(4), ERISA section 701(b)(4), and Code section 9801(b)(4) define a waiting period to be the period that must pass with respect to the individual before the individual is eligible to be covered for benefits under the terms of the plan. In previous regulations, the Departments defined a waiting period to mean the period that must pass before coverage for an employee or dependent who is otherwise eligible to enroll under the terms of a group health plan can become effective.

### 2. Eligibility Rules for Multiemployer Health Plans in General

Notice 2012-17 specifically states that the upcoming guidance under section 2708 is expected to address situations in which, under the terms of an employers' plan, employees are eligible for coverage once they complete a specified cumulative number of hours or service within a specified period (such as 12 months). The Notice also specifically asks for comments on how the waiting period should be applied to plans that credit hours of service from multiple different employers and plans that use hours banks.

Many multiemployer plans cover participants in industries where employment is historically fluid, with participants moving from one employer to another. Hours worked and/or earnings can fluctuate daily, weekly or monthly, and work can be erratic and episodic. This is particularly true with respect to industries like the entertainment industry in which the Fund operates. Indeed, the essential purpose of the multiemployer plan is twofold:

- to allow its contributing employers (which often are small employers) to pool their resources to provide benefits, and
- to allow participants to pool their service with multiple employers in order to obtain health coverage and other benefits under one health plan.

As a result, employees who regularly work in the entertainment industry can maintain continuous coverage even if they frequently change covered jobs. If it were not for the multiemployer plan structure, a significant percentage of these workers might not have access to affordable, comprehensive health coverage for themselves and their families.

Eligibility rules for multiemployer health plans are established by each plan's joint board of trustees (which, pursuant to the Taft-Hartley Act, is almost always comprised of an





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equal number of union and employer representatives) and are designed to reflect the unique working conditions of the particular industry. Typically, contributing employers pay an amount to a multiemployer plan that is set forth in a collective bargaining agreement. The amount can be based on the number of hours, days, or weeks of covered work performed by a covered employee. In the entertainment industry, earnings, rather than hours or some other measure, is often the relevant measure of work.

Whether the multiemployer plan uses hours or earnings, the intent is the same: to establish a proxy for full-time employment in an industry where plan participants work for a number of different employers in any month. Since the working conditions of a particular unionized industry vary, each plan's trustees design eligibility rules that make sense in the context of the work pattern in the particular industry. In so doing, the trustees typically establish an **eligibility period**, with work or earnings during that period leading to a later **coverage period**. Many multiemployer plans use a single calendar quarter as the eligibility period, but a fair number have longer eligibility periods. The reasoning behind the longer eligibility periods is not to deprive employees from coverage but rather to permit employees a longer period of time to be able to meet the requirements to qualify for coverage. Employees who do not accumulate sufficient hours or earnings in their first eligibility period often qualify for coverage during the second eligibility period or possibly later.

Most plans have an established lag period between the end of the eligibility period and the effective date of coverage (i.e., the start of the coverage period), to allow reports documenting hours worked or earnings from the contributing employers to be prepared and sent to the plan and to allow the plan to determine eligibility. Once hours or earnings have been counted and eligibility determined, coverage typically takes effect at the start of the coverage period, on the first day of a month.

Once participants earn coverage during the eligibility period, coverage continues for the full period for which the person is eligible, even if he or she is no longer working in the industry by the time the coverage period begins. Unlike single employer plans, where coverage begins around the date of hire and ends at termination of employment (subject to COBRA), multiemployer plans begin coverage after an eligibility period and then continue coverage on the back end, throughout the coverage period, even if the individual retires or is otherwise not working in the industry. In the entertainment industry, this "tail" of coverage typically lasts at least as long as the eligibility period. In essence, the lack of coverage during the initial eligibility period is balanced out by the extended coverage provided during the tail.

### 3. Eligibility Rules for this Fund

The Fund provides coverage in different ways depending on the type of performer. For freelance artists (and other performers not considered full-time staff and covered roster



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artists in the recording industry), coverage is first attained after earning a specific amount of covered earnings during a period of four calendar quarters or less. A performer qualifies for individual coverage once he or she earns \$10,000. If the performer enrolls and pays the applicable premium, he or she (and his or her dependents, if he or she also qualifies for family coverage) is covered for twelve months. The initial eligibility and coverage periods are summarized in the following table.

Earnings Cycle is twelve months ending	One calendar quarter waiting period is:	Four-quarter coverage period:
September 30	October 1 – December 31	January 1 – December 31
December 31	January 1 – March 31	April 1 – March 31
March 31	April 1 – June 30	July 1 – June 30
June 30	July 1 – September 30	October 1 – September 30

As you can see from the above, the waiting period for coverage is one calendar quarter between when a performer earns enough to qualify and when his or her coverage with the Fund begins. By way of example of how the “tail” coverage works, theoretically, suppose a performer in our Plan earns \$10,000 in September 2011. While the performer would not receive coverage until January 1, 2012, the performer would be eligible for coverage for the *entire* 2012 calendar year *even if* the performer never worked again after September 30, 2011.

A performer will qualify for continued coverage under the Fund if he or she has enough covered earnings during each successive four-quarter *earnings cycle*. Once established, the timeframe of subsequent earnings cycles will not change as long as the performer earns at least \$10,000 in each earnings cycle and does not experience a break in coverage. This table below illustrates the earnings cycles.

Initial earnings cycle period:	One quarter waiting period	Four-quarter coverage period:	Four-quarter earnings cycle for determining continued qualification:
October 1 - September 30	October 1- December 31	January 1-December 31	October 1-September 30
January 1 -December 31	January 1-March 31	April 1-March 31	January 1 – December 31
April 1 - March 31	April 1-June 30	July 1-June 30	April 1-March 31
July 1 - June 30	July 1-September 30	October 1-September 30	July 1-June 30



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Thus, if a performer earns at least \$10,000 in covered earnings during each twelve-month earnings cycle, his or her coverage (and that of their dependents, if eligible) will continue. The Fund provides health coverage to individuals with low levels of earnings, a group that is often not able to enjoy employer-sponsored coverage nor able to afford individual coverage in the insurance market.

A staff performer (full-time staff employee of a radio or television station or network) is treated differently due to the different work pattern. Specifically, such an individual qualifies for coverage on the first day of the month after completing 30 days of full-time employment with a contributing employer. Coverage continues until the last day of the calendar quarter following the quarter in which the staff performer loses employment if the performer was covered continuously for less than five years (not including COBRA or disability coverage), or until the last day of the last coverage period for which he or she qualified based on earnings under the general rules for performers if the performer was covered continuously for five or more years (not including COBRA or disability coverage).

This provision is similar to that in the single employer market, where there is a minimal waiting period for new employees. It is a stark example of the fact that there is no simple paradigm to reflect full-time employment in this type of industry, which creates the necessity for multiemployer plans to consider and establish rules that make sense within the context of industry work patterns not under the plans' control.

In the recording industry, a special qualification rule applies to artists signed to certain record labels if the signatory record label makes an annual special payment to the Fund on the artist's behalf to provide one year of individual coverage. This happens if:

- The performer is a covered artist bound by an exclusive recording agreement with the record label;
- The performer's royalty earnings from that label over the current and immediately preceding six-month reporting period are insufficient to qualify for individual coverage – or the performer is a new artist who recently signed a royalty agreement with a signatory label and does not yet have sufficient earnings to qualify under the normal earnings requirements; and
- The performer enrolls in the Fund and pays the required premium for individual coverage.

In the case of these artists, the Fund often provides health coverage for individuals *before they have any earnings to qualify for coverage*.

You will note that, in summary, **none of the Fund's eligibility and coverage rules described above require a waiting period that exceeds one calendar quarter, as long**



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**as the period during which eligibility conditions are being met is not counted toward the waiting period.** Since the period during which the performer accumulates eligibility is typically made up for in the “tail” period, we believe that interpreting the Act to disregard such period in determining whether the 90-day rule is satisfied is protective of employees and consistent with the purposes of the Act.

#### 4. Recommendation

Notice 2012-17, A7 specifically states that other conditions for eligibility under the terms of a group health plan would generally be permissible under PHS Act section 2708, unless the condition is designed to avoid compliance with the 90-day waiting period limitation. It is our view that eligibility rules should continue to be set by the multiemployer fund’s Board of Trustees. To implement the Act’s ban on waiting periods of more than 90 days, we recommend that the Treasury Department and the IRS start the 90-day clock at the **end** of the eligibility period during which the participant works sufficient hours or has sufficient earnings to become eligible for Fund coverage. This would mean that a fund’s lag period between earning eligibility and commencement of coverage – if it had such a lag period – could not be longer than 90 days.

To the extent that the Departments do not wish to provide a blanket rule in that regard, we respectfully submit that the Departments should disregard the eligibility period when the period of coverage is not less than the period used for the particular participant to attain eligibility. Since the period of coverage is no less than the eligibility period plus 90 days, it would be unreasonable to conclude that such a rule is in any way designed to avoid compliance with the 90-day rule.

We also recommend that three (3) consecutive months be treated as the equivalent of 90 days so that enrollment can take effect at the start of a month, as is typically the case today. Because most health plans measure eligibility in monthly or quarterly increments and base their programming on this standard, a strict 90-day provision would be extremely disruptive, forcing plans to start coverage on the 28<sup>th</sup> or 29<sup>th</sup> day of the month.

### **Employer Shared Responsibility**

#### 1. Background

The Affordable Care Act requires large employers (those with 50 or more full-time employees) to pay a penalty if one of their full-time employees obtains subsidized coverage through a state health insurance exchange beginning in 2014. The amount of the penalty will vary depending on whether or not the employer offers health coverage to its employees.



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## 2. Workers Covered by Multiemployer Health Plans

As discussed above, multiemployer plans cover participants in industries where employment is historically fluid, with participants moving from one employer to another. Hours can fluctuate daily, weekly or monthly, and work can be erratic and episodic. Without the multiemployer plan to pool contributions from contributing employers and pool employees' service with various employers, these individuals would not have access to affordable, comprehensive health coverage for themselves and their families.

## 3. Workers Covered by this Fund

As noted in the description of eligibility rules regarding the 90-day waiting period, the Fund provides coverage based on the level of covered earnings of the performer. Generally, freelance artists are not paid by the hour or for a specific number of hours worked, but are paid based on the project performed. It would be difficult or impossible for an employer to determine the number of hours worked on many freelance projects. Similarly, artists in the recording industry are not compensated based on hours worked. As we noted previously, roster artists can earn eligibility based on a payment made by the record label, and often have little or no earnings that generate contributions to the Fund. Record labels have no access to or industry-related reason to keep track of the number of hours a performer works.

Often earnings are reported in the entertainment industry by paymasters, companies that make payments on behalf of various employers to the performers and the benefit funds. The companies may find it very difficult to coordinate with the paymasters to determine the number of hours worked by a performer for whom contributions are made.

In the entertainment industry, performers often earn royalties or residuals for work performed in the past but for which they still received payment based on their contract. The earnings generated by these royalty and/or residual payments often qualify the performer for health care coverage even if the performer had no related work during the time for which the contributions were made. It makes better sense for employers not to count these individuals as full time employees as they may not perform any services for the employer during the time period in question.

The Trustees have developed the eligibility provisions of the Fund over many years to fit the intricacies of the wide variety of types of work in the industry covered by the Fund. We feel that exempting employers from the free-rider penalty for the employees on whom they make contributions to this Fund allows the Fund to design eligibility rules and plan designs that best fit the collective interests of employers and employees in the entertainment industry. This request is consistent with the Affordable Care Act because the Fund's eligibility provisions have been designed over time through a shared



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responsibility of employers and employees, where the Board of Trustees (jointly representing the Union employees and the contributing employers) developed eligibility provisions to promote expanded and affordable health coverage.

#### 4. Multiemployer Plans and the Free-Rider Penalty in General

Many contributing employers to multiemployer plans will not be subject to the penalty due to their small size. Many other contributing employers will not actually have to pay the penalty because the health coverage provided to their employees through the multiemployer plan will meet the 60% minimum value test and the coverage will be affordable. Health coverage provided through multiemployer plans is typically comprehensive, with cost-sharing requirements that would easily meet the 60% test. The coverage will typically meet the affordability test because contributions from multiemployer plan participants for their own or their family's coverage tend to be modest (if required at all). As a result, it makes little sense to try to design ways to count the hours worked by different types of workers, for multiple employers, for the purpose of assessing a financial penalty that will rarely apply. Indeed, we believe that any attempt to determine hours in this industry would prove impossible.

#### 5. Recommendation

We recommend that the Treasury Department and the IRS exempt contributing employers from the free-rider penalty *with respect to collectively bargained employees for whom the employer makes collectively bargained contributions to a multiemployer plan that provides health benefits* (whether those health benefits are self-insured, insured, or some combination). This means that such employees (a) would not be counted in determining whether the employer is large enough to be subject to the free-rider penalty; and (b) would not be taken into account in determining how much is owed, if the penalty applies with respect to the employer's non-bargained employees.

Most of the complexity in implementing the free-rider penalty where employers provide health benefits through a multiemployer plan stems from the difficulty in applying the concept of full-time employee to many of the workers typically covered by multiemployer health plans. This is especially true in the entertainment industry. Part of the complexity stems from the contributing employers' lack of critical information relevant to the operation of the free-rider penalty, plus their lack of control over the plan design decisions. Since eligibility rules, benefit levels, and participant contribution requirements (if any) are set by the plan's Board of Trustees, contributing employers generally will not know (a) whether a particular individual has accrued enough hours or earnings to be eligible for plan coverage; (b) the effective date(s) of that coverage and coverage period(s); (c) whether the plan meets the 60% minimum value test; or (d) whether participant contributions are required and, if so, the amount of those





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contributions. Similarly, the multiemployer health and welfare plan may not know whether an individual is working “full-time” as defined under the law, and even when they do, they often only receive that information a month or longer after the work is completed.

To the extent that the foregoing recommendation is not adopted, at the very least, the free-rider penalty should not apply within the 90-day period (as proposed in Notice 2012-17), *or* during the eligibility period used to determine whether the participant has sufficient earnings, as designated by the multiemployer plan’s eligibility rules, to become eligible for health coverage through the multiemployer plan. Employment in the entertainment industry can be very sporadic, and employees can qualify for coverage based on earnings for one eligibility cycle and not in the following cycle, then qualify again in a future eligibility cycle.

For that reason, we further note that the concept of “newly hired” employees does not readily apply in an industry where much work is project related. Even if it were possible for an employer to define the concept of “newly hired”, the plan itself would not be able to define eligibility provisions around that definition because the plan is not part of that employment relationship.

Therefore, we encourage the Departments to recognize the project nature of work and earnings in the entertainment industry and allow the multiemployer plans to establish eligibility provisions that meet the needs of the employers and participants within the industry. Thus, as noted above, we recommend that the Departments exempt contributing employers from the free-rider penalty with respect to collectively bargained employees for whom the employer makes collectively bargained contributions to a multiemployer plan that provides health benefits. To the extent the Departments wish to implement a more narrow rule, we recommend that they instead conclude that no free-rider penalty will apply with respect to any such collectively bargained employees (for whom such contribution is made, whether newly hired or otherwise) to the extent that the employee has not yet satisfied the eligibility requirement and 90-day waiting period, provided that the eligibility requirement is not designed to avoid compliance with the 90-day waiting period limitation (consistent with our recommendation above). As noted above, this is unlikely to impact the length of coverage a full-time employee would receive because typically the employee would receive coverage for a designated period even after he or she is no longer working. Put another way, each 12-month period to establish eligibility creates another 12 months of coverage, even after all work ceases.

In addition, if the foregoing recommendation is not adopted, we respectfully submit that the Departments will need to craft rules that address the fact that in certain types of work in the entertainment industry, it is impossible for the Fund (or even an employer) to determine the hours worked and, in many other segments where it is possible, it is very



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difficult. In that case, the Departments should identify an alternative definition of full-time that is based on cumulative earnings within a period that is no less than 12 months.

We appreciate the opportunity to submit comments on these important issues. Please do not hesitate to contact me at 212-499-4821 if you have any questions about our comments or need additional information.

Respectfully submitted on behalf of the Board of Trustees,

A handwritten signature in blue ink, appearing to read "Christine Dubois", with a long, sweeping flourish extending to the right.

Christine Dubois  
Chief Executive Officer