American Federation of Labor and Congress of Industrial Organizations

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

Re: Notice 2012-58—Determining Full-Time Employees for Purposes of Shared Responsibility of Employers Regarding Health Coverage

Ladies and Gentlemen:

These comments on Notice 2012-58, issued by the Department of Treasury and the Internal Revenue Service ("Treasury"),[1] are submitted on behalf of the American Federation of Labor and Congress of Industrial Organizations ("AFL-CIO") and its 56 affiliated unions. Together with its community affiliate, Working America, the AFL-CIO, represents more than 12 million workers across the country in both the private and public sectors. Collectively, our affiliated unions negotiate health care benefits for almost 40 million workers, retirees and their family members, and these benefits are provided through single employer and multiemployer plans, both insured and self-funded.

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[1] At the same time, Treasury and the Departments of Labor and Health and Human Services each issued "Guidance on the 90-Day Waiting Period Limitation under Public Health Service Act §2708." *See* Notice 2012-59 and Technical Release 2012-02.

Notice 2012-58 builds on earlier guidance issued by Treasury for determining whether employees will be considered full-time employees for purposes of the employer responsibility requirements of Internal Revenue Code Section 4980H ("Section 4980H"), one of the central provisions of the Affordable Care Act ("Act"). This statutory requirement, in effect, gives large employers a choice in how they share responsibility for providing affordable health care coverage to workers: either offer affordable health coverage to their full-time employees or pay an employer shared responsibility assessment when full-time employees enroll in a qualified health plan through an exchange and qualify for premium credits.[2] In keeping with the goals of the Act to expand the availability of coverage, to build on and strengthen workplace-based health care coverage and to provide for shared responsibility from employers, Treasury should exercise its regulatory authority so that more—not fewer—employees are considered full-time employees, as intended by Congress and consistent with the language of the Act. As discussed below, we are concerned that the approaches detailed in Notice 2012-58 will limit the number of workers considered full-time employees, as well as invite employer manipulation to avoid either providing affordable health care coverage or paying an employer responsibility assessment under Section 4980H.

The safe harbor for new employees in Notice 2012-58 also undermines Section 2708 of the Public Health Service Act.[3] By allowing an initial measurement of up to 12 months following an employee's start date, employees categorized as variable hour employees could work full-time for 13 months before an employer offers health care coverage or is responsible for a penalty under Section 4980H. As a result, for some employees, the 90-day waiting period limitation will become virtually meaningless.

Appropriate Application and Scope of Safe Harbors

As noted in our comments responding to Notice 2011-36 and Technical Release 2012-02, the framework underlying the safe harbor approach appears to be based on a traditional workplace, one where employees work an eight-hour day on a routine basis throughout the year. But, that construct does not reflect the variety of workplaces and schedules across the country and in different sectors. In some industries, such as airlines, full-time employees would not be considered as such under the safe harbor because of the way work hours are calculated or applicable legal restrictions on hours worked. The traditional schedule in education includes holidays and an extended summer break which could lead to employees failing to satisfy a weekly average hours of service requirement calculated on an annual basis. Without addressing

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[2] In addition to premium assistance, individuals with household incomes below 250 percent of the federal poverty level may also be eligible for cost-sharing reductions.

[3] The guidance on the 90-day waiting period limitation explicitly incorporates the measurement period concept from Notice 2012-58 and permits its use under Section 2708.

the wide variety of specific work patterns, the safe harbor approach on which employers may now rely could lead to treating employees long considered full-time employees as something less, a result that must be avoided.

Although Notice 2012-58 does not specifically address the concerns that the AFL-CIO, some of its affiliates and other unions expressed about the safe harbor approach to determining the full-time status of employees, we appreciate that Treasury is interested in discussing alternatives to assure that employees working in specific industries and sectors are considered full-time employees under Section 4980H.

While it is impossible to anticipate the myriad ways in which some employers and their consultants will seek to evade the employer responsibility requirements under the Act, they undoubtedly will attempt to do so by artificially structuring or restructuring positions and gaming any flexibility provided to them under the Notice to their own advantage, with the cost paid by the taxpayers and individual workers, employment-based coverage further eroded, and the purposes of the Act undermined. It is critical, then, that Treasury explicitly address these potential evasions with a clear statement that work arrangements and applications of the safe harbor that have no reasonable business purpose will not be permitted.

We also urge Treasury to consider limiting the availability of the safe harbor measurement and stability period approach in Notice 2012-58 to those employers that offer health care coverage to their employees. None of the three purposes for the guidance given by Treasury apply in the case of an employer that does not offer health care coverage. And, limiting the scope of the safe harbor is more consistent with the underlying purpose of the employer responsibility requirements and the Act.

Categorizing Employees

We believe Treasury should provide additional guidance for determining whether a new employee is reasonably expected to work an average of at least 30 hours per week, but we are opposed to any guidance expanding employer flexibility to delay or deny affordable health care coverage to employees who are in fact full-time and avoid the payment of employer shared responsibility assessments. It should be noted that Notice 2012-58 doubles the length of the initial measurement period employers may choose to 12 months, up from the six-month period outlined in Technical Release 2012-01, a period we suggested was too long. The lengthening of the initial measurement period greatly increases the incentive for employers to categorize new employees as variable hour workers. We are concerned that creating new or expanded categories of positions that can be treated the same as variable hour employees will further tilt the competitive playing field in favor of those employers that take full advantage of such opportunities.

In determining the status of new employees as of their start date, we suggest that, at a minimum, an employer must consider:

- Whether the new employee is replacing an employee treated as a full-time employee
- Whether the hours of current employees in the same or comparable positions or classifications vary (with guidance provided on the extent of variance needed to support a "variable hour" classification)
- Whether the business historically experiences a variable workload

In keeping with the statutory requirements and underlying purposes of the employer responsibility provisions, it is our view that Treasury should not allow employers to use the safe harbor measurement and stability period approach to determine the full-time status of any employees regularly hired for limited periods of time, including employees considered "seasonal employees," if they are in positions where the weekly hours of service have traditionally been at least 30 hours per week or the employee is reasonably expected to work 30 or more hours per week. From our perspective, the label applied to these employees, whether seasonal, short-term assignment, project or contract employees, should make no difference. If they are expected to earn more than 30 hours of service in a week for the term of their employment, these workers should be designated and treated as full-time employees under Section 4980H.[4]

With respect to the definition of "seasonal worker," it is imperative that any definition be limited to workers employed for only short periods of time. Because Section 4980H(c)(2)(B)(ii) provides an exemption from the definition of "applicable large employer," it should be construed narrowly, and the definition of seasonal worker should reflect that approach. Moreover, the two examples of seasonal work included in the statutory provision—agricultural work[5] and retail holiday seasons—are by their nature significantly shorter than the seven or nine month periods provided in Treasury Regulation §1.105-11(c)(2)(iii)(C), an existing legal definition cited in the Notice. Each of the statutory examples involves relatively short and discrete periods of time that regularly occur. In considering any definition, Treasury should not prescribe a period longer than the statutory examples as doing so would expand the class of exempt employers, a result inconsistent with the structure of the statute. Similarly, if the definition is also to be applied in

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[4] We also note that our suggested approach is consistent with the view of the Congressional Research Service ("CRS"). According to CRS, for any month in which a "seasonal worker" is full-time, a large employer could be subject to a penalty if such an employee received premium credits through the Exchange. Congressional Research Service, *Summary of Potential Employer Penalties Under the Patient Protection and Affordable Care Act (PPACA)*, R 41159 (August 9, 2011).

[5] The DOL regulation in Section 4980H(c)(2)(B), 29 CFR § 500.20(s)(1), does not include a time frame and describes "on a seasonal basis" as "... employment ... of the kind exclusively performed at certain seasons or periods of the year and which, from its nature, may not be continuous or carried on throughout the year."

determining whether a "seasonal worker" has full-time employee status, it must be narrowly tailored so more employees are treated as full-time employees.

We also suggest that Treasury not provide any additional safe harbor methods for employers with respect to so-called "high-turnover positions." Creating additional categories of employees who must do more than earn a monthly average of 30 hours of service per week in order to be considered full-time employees only further undermines the Act and benefits employers that choose to provide working conditions and compensation that result in high turnover.

Hours of Service

One shortcoming of the approach to determining an employee's full-time status that we previously raised remains unaddressed in Notice 2012-58—the use of 130 hours of service in a month as the monthly equivalent of 30 hours per week.[6] As explained by the AFL-CIO and other unions in their comments on Notice 2011-36, employees may average 30 hours of service on a weekly basis but not complete 130 hours of service in a calendar month. During five months of the year—February, April, June, September and November—employees who work 30 hours in each week will accumulate fewer than 130 hours in the month and fail to be considered full-time employees. We urge Treasury to use 120 hours of service in a calendar month as the monthly equivalent of 30 hours per week. Section 4980H(c)(2)(E) directs the use of 120 hours when calculating the number of full-time equivalent employees to determine whether an employer is an applicable large employer, and we see no basis to permit employers to require more hours of service when determining employee status. In addition, using 120 hours assures that all employees averaging at least 30 hours of service per week in any calendar month will be considered full-time employees.

We are also concerned that Notice 2012-58 refers to "hours of work," rather than hours of service, the statutory term, when describing the measurement unit for determining full-time status. While the terminology may be shorthand and not a substantive change, we urge Treasury to clarify that it is "hours of service," the broader term, which includes not only hours when work is performed but hours for which an employee is entitled to payment and hours when no work is performed and an employee is paid. In addition, consistent with our concern that the safe harbor approach reflect the variety of workplaces and schedules across different sectors, the "hours of service" included in determining the full-time status of an employee should take into account the scheduling practices in the industry or sector in which an employee works.

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[6] The Notice states that "... proposed regulations are expected to provide ... that 130 hours of service in a calendar month would be treated as the monthly equivalent of 30 hours of service per week." (p. 3 at fn.4)

Reporting, Disclosure, and Enforcement

As important as it is for employees to be properly classified as of their start date under the safe harbor sanctioned in Notice 2012-58, it is just as critical for Treasury to adopt and implement procedures for oversight and enforcement in order to detect, as well as discourage, employer abuse and manipulation. For example, Treasury could determine which industries and employers have a high proportion of variable hour employees, as well as those experiencing high turnover, and target those employers for examination and audit. If a significant number of employees from a single employer receive premium credits through the exchange, but the employer is not subject to assessment under Section 4980H, it may indicate that employees have been inappropriately classified. Another possibility for abuse is if new workers are considered variable hour employees during the initial measurement period, but they in fact receive employer coverage during the stability period.

There may be a variety of methods for Treasury to consider in determining whether or not the safe harbor has been abused. One possibility is to set a measure of variance in work hours and compare the measure to assess how an employer uses the "variable hour" designation. If the actual hours credited to employees categorized as variable hour employees are not consistently variable—that is, they are not on average less than 30 hours per week—then the employer could be prohibited from using the safe harbor prospectively and assessed appropriate penalties under Section 4980H retroactively.

Under Code Section 6056, large employers are required to report on the health care coverage they provide to full-time employees, including the number of full-time employees and the identity of the employees covered by a plan and the months for which they are covered. Having created several new employee categories under Notice 2012-58, we suggest that Treasury modify the reporting requirement to include information on the status of each employee and if the safe harbor measurement and stability approach is being used, information about the periods, such as the beginning and end dates. Obtaining information relevant to the safe harbor approaches included in the Notice will allow Treasury and the other agencies to assess the use of the safe harbor methods and their impact on employees.

In addition, for employers choosing to adopt the safe harbor approach, appropriate notice must be provided to employees about their status and potential eligibility for premium credits through the exchange. This information will be needed when employees seek coverage so the exchange can properly determine their eligibility.

We appreciate the opportunity to provide comments in response to Notice 2012-58, and we urge Treasury to incorporate our suggestions in any proposed rule or other guidance to be issued.

Sincerely,

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Benefits and Social Insurance Policy Specialist

cc: Office of Health Plan Standards
and Compliance Assistance
Employee Benefits Security Administration
U.S. Department of Labor