



National Grocers Association

April 9, 2012

Submitted electronically via e-mail:

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Office of Health Plan Standards and Compliance Assistance
Employee Benefits Security Administration
Room N-5653
United States Department of Labor
200 Constitution Avenue, N.W.
Washington, D.C. 20210

RE: Frequently-Asked-Questions From Employers Regarding Automatic Enrollment, Employer Shared Responsibility, and Waiting Periods

Dear Sir or Madam:

The National Grocers Association (“N.G.A.”) appreciates the opportunity to provide comment on the Department of Labor Notice 2012-17 (“Notice”) “Frequently-Asked-Questions From Employers Regarding Automatic Enrollment, Employer Shared Responsibility, and Waiting Periods.”

N.G.A. is the national trade association representing the retail and wholesale grocers that comprise the independent sector of the food distribution industry. An independent retailer is a privately-owned or controlled food retail company operating a variety of formats. Most independent operators are serviced by wholesale distributors, while others may be partially or fully self-distributing. Some are publicly traded but with controlling shares held by the family and others are employee owned. Independents are the true “entrepreneurs” of the grocery industry and dedicated to their customers, associates, and communities. N.G.A. members include retail and wholesale grocers, state grocers associations, as well as manufacturers and service suppliers.

N.G.A. membership is comprised of over 20,000 retail locations with annual total revenue of over \$200 billion. It represents employers of all sizes, ranging from large, multi-store operators, to single store operators, to wholesale distributors. The workforces are also diverse, containing unionized and non-unionized workforces, and are comprised of high numbers of part-time workers.

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Consequently, one of N.G.A.'s top priorities with regards to health has been ensuring that the "Employer Shared Responsibility" provisions apply to employers in a workable manner, especially with respect to part-time workers and new hires. The independent grocer segment employs a disproportionately large number of part-time workers and, thus, will be significantly impacted by the Employer Shared Responsibility requirement that employers provide coverage to employees who work on average at least 30 hours per week. Prior to the Affordable Care Act ("ACA"), the vast majority of our members would not have considered such 30-hour employees full-time or eligible for coverage under their group health plans. The resulting explosion of individuals potentially eligible for coverage, coupled with the increased costs of ACA mandated coverages and generally unsustainable medical trends, have placed our members' ability to provide benefits in 2014 very much in question. This effect is acutely felt by our members with unionized workforces who may be contractually obligated to provide part-time workers with benefits and would require that such workers receive expensive ACA compliant packages.

For N.G.A. members, the decision to continue to provide coverage or drop coverage in 2014 is dependent upon several factors. Primary among such factors is their ability to limit the number of individuals eligible for coverage to only those that are truly full-time. Thus, the determination of which employees are full-time within the meaning of the law will be of great significance. These comments therefore, focus upon two key issues which directly relate to an employee's status under the law: 1) the applicability of the "Look-Back Stability Safe Harbor" proposal ("Safe Harbor"), and 2) the coordination of the Safe Harbor with waiting and administrative periods.

We again appreciate this opportunity to comment. Our specific recommendations with regard to the above issues are discussed in detail below.

I. Safe Harbor

The N.G.A. is supportive of the Departments' Safe Harbor proposal¹ and in a previous comment letter in response to IRS Notice 2011-36 urged the Departments to allow employers to use up to a twelve month look-back and stability period for both new hires and existing employees. We would again reiterate our strong support for such an approach. A uniform twelve month look-back and stability period strikes an appropriate balance by providing employees with a stable vehicle for obtaining benefits, without being enrolled and disenrolled in coverage as their workloads fluctuate, while simultaneously allowing employers to appropriately restrict their plans to "full-time" workers.

The Notice partially adopts the above suggestion in relation to currently employed employees only. While the N.G.A. strongly supports the twelve month look-back and stability period timeframe proposed for current employees, we have significant concerns regarding the approach outlined for newly hired employees.

¹ In general, any proposed Safe Harbor would allow an employer to determine each employee's full-time status by looking back at a defined period of time not less than three but not more than twelve consecutive calendar months ("Measurement Period") followed by a corresponding period of time during which the employee's status as full-time or part-time employee will be "fixed" for purposes of the shared responsibility provisions ("Stability Period").

In the context of new hires, the Notice proposes a more complex “tiered” system for administering the Safe Harbor (“Tiered Safe Harbor”). According to the Notice, “[i]f a newly-hired employee is reasonably expected to work full-time on an annual basis and does work full-time during the first three months of employment, the employee must be offered coverage...as of the end of that period.” However, if it is unknown as of the time of hire whether the newly hired employee is expected to work full-time, a two-step process must be followed. If the employee works full-time during the first three months of employment, and such hours are reasonably viewed as representative of the hours the employee is expected to work, then the employee must be offered coverage. If the employee’s hours are not reasonably viewed as representative of the number of hours the employee is expected to work, the plan is permitted an additional three month look-back period to determine the employee’s status. If the employee does in fact work a requisite number of hours at the end of the second look-back period, the employee must be offered the opportunity to enroll in coverage regardless of whether the employee’s hours are representative of the hours the employee will work in the future.

As proposed, the Tiered Safe Harbor is administratively unworkable, will subject members to tort liability, will result in a significant number of false positives, and will negatively impact our members’ hiring practices in a way that disadvantages workers and employers.

a. The Tiered System Would Result in Administrative Burdens

The Tiered Safe Harbor is complicated and is unlikely to be feasible from an administrative standpoint. This is especially true for our smaller company members who are treated as large employers under the ACA. More than 50 percent of our members are single store operators and do not have large corporate human resources or employee benefits departments to handle the administration of benefits. The processes and calculations necessary to manage and track the number of hours that a newly-hired employee would work, and then to conform such hours to the employer’s expectations as to whether an employee is part-time or full-time, will significantly detract from such members’ ability to run their businesses. For many of our members, the person responsible for this process would be the same persons or person responsible for the operation of the business. It cannot be expected that the person responsible for payroll, staffing, ordering, accounting, and the many other duties required to run a successful store would be able to manage this process. In order to not interfere with operations, compliance with the Tiered Safe Harbor would likely require the purchase of expensive automated systems or require the outsourcing of the administration of this process. As discussed above, such expenditures are not feasible for many of our smaller members.

b. The Tiered System Would Subject Our Members to Tort Exposure

The administration of the Tiered Safe Harbor could result in tort exposure. As proposed, the Tiered Safe Harbor grants an employer a second look-back period anytime it is “reasonably” determined that after the first three month look-back period the hours an employee worked are not representative of his or her expected hours. When an employee is denied the opportunity to enroll in coverage after averaging over 30 hours a week during the first look-back period, the propriety of that reasonableness determination could be questioned. In such circumstances, the

employer could be subject to liability in the event an employee is injured and is without health coverage after working a requisite number of hours during the first look-back period. Because of this threat of litigation, employers will be reluctant to utilize this second look-back period even when it is clear that the employee is not a full-time employee.

c. The Tiered System Would Cause Costly False Positives

The Tiered Safe Harbor is likely to lead to a significant number of costly “false positives” where, based on the truncated measurement period, a part-time employee is considered to be full-time and thus eligible for coverage.

For example, as a “main street” employer, many N.G.A. members hire high school students over the summer, never intending these hires to be considered full-time or eligible for benefits. As is typical with independent businesses, our members hire these employees based on an identifiable need and generally have a backlog of work that has built up over the past year for them to perform. In such incidences, this backlog of work will initially cause the employee to work more than the requisite amount of time that would qualify these individuals for coverage.

Under the Notice, an employer has the option of determining that the number of hours the high school employee worked during the three month initial look-back period are not representative of the employee’s likely hours moving forward, thus triggering a second three month look-back period. However, the second look-back period only provides relief if the workload increase does not cross over into the second look-back period.

For example, it is common for high school students to apply for, and begin working at, their summer jobs before the school year ends. If the employee works only a few hours a day and weekends for a month or two leading up to the summer and then begins addressing the likely backlog of work when summer break begins, it is likely that the corresponding increase in hours would “bleed over” into the second three month look-back period qualifying that employee for benefits. Further, it is possible that, depending upon the measurement, if time is aggregated among the two look-back periods, a single involved task during the first look-back period could qualify the employee as a full-time employee during the second look-back period.

d. The Tiered System Would Negatively Impact Employers’ Hiring Practices

N.G.A. members rely upon part-time workers as a part of their business model. More importantly, N.G.A. members pride themselves as being a part of the community. For example, it is not uncommon for the local grocery store to give students an opportunity to earn spending money while attending college or to give a homemaker the opportunity to work while his or her children are in school. If the Tiered Safe Harbor was implemented, it would provide a strong disincentive to hiring any part-time workers for fear that any increase in workload could result in an obligation to provide costly health benefits. The end result will be a chilling effect on hiring and/or will result in hiring practices where part-time employees are not hired for sustained periods in excess of three months.

e. Proposal

N.G.A. members are committed to providing benefits to their employees and believe that the benefits associated with providing health care far outweigh the costs. However, our members must maintain some degree of control over the number of individuals eligible for coverage or the costs of the additional enrollees, the administrative burden, the tort liability, and the impact on their hiring practices discussed above will quickly “tip the scales” in favor of dropping coverage in 2014.

A uniform twelve month look-back and stability period for new hires would alleviate much of the concern expressed above. Such an approach would provide predictability as to the number of individuals eligible for our members’ plans, would minimize disruptions to our hiring practices, and would lessen the administrative burden to a manageable degree so that multiple complicated systems would not have to be used.

Based on member feedback, a twelve month look-back and stability period would keep the maximum number of our members from discontinuing coverage in 2014. However, it is likely that, if the period of time from hire until mandated enrollment does not exceed 9 to 10 months from the date of hire inclusive of any waiting periods or administrative periods, it will be difficult for many of our members to provide benefits in 2014.

II. Coordination of Waiting and Administrative Periods with Safe Harbor

The Notice states that “the Departments intend to retain, for purposes of the PHS Act section 2708, the definition in existing regulations that the 90-day waiting period begins when an employee is otherwise eligible for coverage under the terms of the group health plan.” The N.G.A. agrees that an interpretation whereby the 90 day waiting period does not begin until the employee is otherwise eligible for coverage is consistent with the statute as well as existing regulations promulgated under HIPAA. In the context of new hires, we understand this interpretation to mean that the 90 day waiting period would not begin until after the employee is deemed eligible for coverage using the Safe Harbor method.

In addition, we are appreciative of the Treasury and IRS’ stated intent to be, “mindful of employers’ requests for safe harbors and simplicity and will seek to accommodate those requests to the extent feasible and consistent with the terms of the statute.” In light of this openness, we would like to again advocate that employers be permitted an administrative period, as proposed in IRS Notice 2011-36. IRS Notice 2011-36 proposed to provide employers with the option of taking an administrative interval between the end of the look-back period and the beginning of the stability period to perform necessary calculations, notify employees of their eligibility, and enroll employees in coverage. The Notice tentatively proposed an administrative period of up to a month.

We again strongly support the inclusion of an administrative period and agree with the Agencies that one month is a reasonable period of time. However, we caution that this administrative period must be exclusive of the 90 day waiting period in order for the Safe Harbor approach to be viable from an administrative perspective. As stated above, many of our smaller company

members are single store operators with a limited number of administrative personnel to perform eligibility calculations and notifications. In such cases, the person who will be responsible for managing the enrollment task will be the owner, who must also run the business. It is not practical for this individual to perform calculations for and notify up to 100 employees of eligibility while simultaneously doing payroll, staffing, ordering, accounting, and the many other duties required to run a successful store.

Simply put, a month is likely the minimum period of time in which this task could be coordinated with the other demands placed on store owners. We hope the Departments will recognize the need to protect the effective and efficient operation of these businesses. Without an ample period of time in which to perform the necessary calculations and notifications, the provision of benefits will interfere with our members' business operations which could, in-turn, lead to these employers dropping coverage.

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The N.G.A., and its member independent retail, and wholesale grocers, appreciate the opportunity to comment on the Notice. Please do not hesitate to contact us with any questions or concerns.

/s/
Gregory B. Ferrara
Vice President Government Affairs
The National Grocers Association