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To: [E-OHPSCA-ER.EBSA](#)
Subject: DOL Technical Release 2012-02 comment under Affordable Care Act
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> I manage health plans for an outsourced services industry company and offer the following comments in regard to providing a "safe harbor" definition of "variable hour employee" under the Affordable Care Act:

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>> 1. Companies that rely on third-party agreements to determine staffing levels have little control over employees' length of assignment and part-time/full-time status. Such companies cannot carry out workforce planning in the same way that other companies can. Examples are staffing agencies and outsourced services. In the outsourced services industry, the employer commits to providing a uniformed, equipped, supervised employee, typically on a full-time basis. The client commits to paying for the employee and related costs, but retains the right to terminate the service on short notice, such as 30 days or less. The service company in good faith hires, trains, and equips the employee, and assigns the employee to a 40 hour per week shift at the client site, but has no certainty that it will be able to continue to employ the employee at that client site or another such site for any specific length of time. As a result, an employee assigned to an initial 40 hour per week shift may go without an assignment for a period of time, and/or perform fill-in or other variable work for less than 30 hours per week for some period of time, such that over a period of 6 months or one year the employee will work an average of less than 30 hours per week. The services employer cannot determine in advance or fully control the employee's work hours. The indeterminate nature of such assignments should be included in the "variable hour employee" safe harbor.

>> SUGGESTED SAFE HARBOR: An employee whose employment is contingent upon a third-party agreement terminable on notice not to exceed 90 days may be classified as a "variable hour employee."

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>> 2. High turnover positions create special problems in cost and administration. Such positions are generally entry level, and provide a socially useful stepping-stone into private sector employment. It is common for outsourced services companies, as an example of a type of employer operating in a high employee turnover environment, to invest significant amounts in recruiting, screening, and equipping such employees, only to have them depart after 60, 90 or 120 days of service. Service outsourcing companies hire significant numbers of entry-level employees who may have never previously held full-time positions in the private sector. Holding such employers to the same 90 day standard for new full-time employees as is required for highly-paid professional positions will create an unreasonable burden and could disrupt the medical services received by such employees. For example, a new employee previously covered by an Exchange, receiving a subsidy, after 90 days would be enrolled in the employer's plan. If the employee then quit after 120 days of service, he or she would return to the Exchange and apply for a subsidy. If the employee had a serious health condition, there might be a disruption in providers and other serious complications. Therefore, it would be better to recognize that high turnover positions should be viewed as "variable hour" in the sense that it is predictable many employees will work full time in such positions for less than one year. From (a) the employer perspective, in terms of cost and administrative complexity, (b) the employee perspective, in terms of disruptions in medical care, and (c) the Exchange perspective, in terms of data management and administrative complexity, high turnover

>> positions should be included in the "variable hour employee" safe harbor.
>> SUGGESTED SAFE HARBOR: An employee in any reasonable job classification or category of positions that historically, at the company or labor market level, evidence a consistent pattern of high turnover, defined as a year-over-year change of individual employees for stable positions of 20% or greater, may be classified as a "variable hour employee."