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VIA ELECTRONIC MAIL

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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

Re: Technical Release 2012-01

Request for Comments on Frequently-Asked-Questions Regarding Automatic Enrollment, Employer Shared Responsibility, and Waiting Periods (Technical Release 2012-01)

To Whom It May Concern:

We submit this letter in response to Technical Release 2012-10 (“Release”), requesting comments on various approaches for interpreting the provisions of §4980H of the Affordable Care Act (“ACA”) governing automatic enrollment, employer shared responsibility, and the 90-day limitation on waiting periods. We thank you for the opportunity to participate in the process of developing regulatory guidance regarding these critical provisions of the ACA.

The Service Employees International Union (“SEIU”) represents 2.1 million workers, advocating to improve their lives and the services they provide. SEIU is the largest healthcare union with more than 1.1 members in the field, including nurses, LPNs, doctors, lab technicians, nursing home workers, and home care providers. As the largest property services union, SEIU represents 225,000 members in the building cleaning and security industries, including janitors, security officers, superintendents, maintenance workers, window cleaners, and doormen and women. With more than 1 million local and state government workers, public school employees, bus drivers, and child care providers, SEIU is the second largest public services union. Our members receive employment based health benefits through multi-employer plans, government plans and employer-sponsored plans, but many workers in these industries, especially low-wage workers, do not have employer-sponsored coverage.

As one of the strongest advocates for passage of health reform, SEIU has a deep interest in the successful implementation the ACA in a manner that is consistent with the legislative goal of expanding coverage by building off of, rather than replacing, employment-based health insurance. We hope the following comments will help guide the Departments of Labor, Health and Human Services, and the Treasury (collectively “the Departments”) in developing regulations that promote that legislative goal, resulting in expanded, affordable health coverage for millions of working people.

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Question 1: Automatic Enrollment: Timeline for issuing guidance

The Release indicates that the Department of Labor has concluded that its automatic enrollment guidance will not be ready to take effect by 2014.

We would like to underscore the importance of having automatic enrollment regulations in place before 2014. The goal of the ACA is to increase coverage and the automatic enrollment requirement is an important tool to encourage maximum utilization of employer-based coverage. Failure to include an automatic enrollment requirement for employers as we transition to the reformed system may result in employer-based coverage rates much lower than expected, thereby substantially undercutting the impact of healthcare reform. In addition, more consumers may find themselves liable for the individual responsibility penalty even if they have a valid offer of employer-sponsored coverage. It will also be much easier to ensure coordination with other critical components of the ACA related to employer responsibility if automatic enrollment is implemented at the same time other requirements are implemented. While we recognize that there are sectors and situations where automatic enrollment carries special challenges, we strongly encourage the Department to release final regulations on automatic enrollment in time to take effect by 2014.

Question 2: Permitting employers to use an employee's W-2 wages as a "safe harbor" in determining the affordability of employer coverage, as outlined in IRS Notice 2011-73

We support the use of an affordability safe harbor to protect employers from being penalized when an employee's household income is lower than the wages the employer has paid to the employee. However, as described in our comments on Notice 2011-73, provisions must be put in place to ensure the safe harbor does not become a tax loophole allowing employers to offer unaffordable coverage without paying the assessment.

While outside the scope of the Release, we reiterate that, even with family coverage excluded from the safe harbor as described in our comments on Notice 2011-73, under the proposed test for affordability of family coverage as described in REG 1131491-10, thousands of dependents of low-wage employees will not be able to access premium tax credits despite the fact that the cost of employer-sponsored family coverage exceeds 9.5% of their family income.

Question 4: Use of a look-back/stability period safe harbor, based on the approach outlined in IRS Notice 2011-36

As described in our previously submitted comments on Notice 2011-36, we believe a look-back/stability period safe harbor is unnecessary and inappropriate for the purpose of calculating an applicable large employer's assessable payment. The system creates an inaccurate assessment of an employer's liability and is ripe for employer abuse and manipulation, particularly in industries with high turnover or where there are fluctuations in employee hours.

For these reasons, we urge the Departments to reconsider permitting the use of a look-back/stability approach. However, if the Departments choose to issue proposed regulations or other guidance that allows employers to use a look-back/stability period safe harbor, we strongly encourage the Departments to:

- Limit the length of the look-back periods for current employees; no measurement period should exceed ninety days;
- Require uniform application of the periods across classifications;
- Prohibit employers from changing the length or scheduling of measurement periods;

- Add robust monitoring and enforcement mechanisms; this should include a clear and enforceable process for redress in cases where employees believe their status has been wrongly categorized.

Particular attention should be paid to settings where employees' hours vary over the course of the year.

Question 5: Determining full-time status of a newly-hired employee

The Departments propose a system where, in some circumstances, employers would have up to six months to determine the full- or part-time status of a new employee (two three-month periods). This system creates an incentive for employers to manipulate scheduling in order to avoid the 4980H penalty. We recommend the Departments:

- Eliminate the option of a second three month period to determine status for new hires. If the Departments choose to maintain this option, the conditions under which an employer may apply it must be narrowed to ensure it is not used to prolong evasion of the penalty when workers are working full-time.

Finally, the Release states "it is anticipated that the guidance will allow look-back and stability periods not exceeding 12 months." This language is unclear. It is not clear whether the stability periods together may total 12 months or less or *each* may be 12 months long. We encourage the Departments to clarify this language and, as noted above, limit the length of the measurement periods.

We thank you again for the opportunity to provide comments on these important provisions of the Affordable Care Act.

Sincerely,



Carol Golubock
Director of Policy



Amy Adams
Coordinator, Healthcare Policy